110-223

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1182.

DAVID DOWS & CO., Plaintiffs in Error.

vs.

P. P. JOHNSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA, WESTERN DIVISION.

FILED OCTOBER 3, 1883.

SUPREME COURT OF THE UNITED STATES.

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IN THE

SUPREME COURT

OF THE UNITED STATES,

NO. 1182.

DAVID DOWS & CO.. Plaintiffs in Error,

vs.

P. P. JOHNSON.

AGREEMENT FOR SUBMISSION.

It is hereby agreed, by and between the parties to the above entitled cause. that the same shall be submitted to the said Supreme Court, at its October Term for the year 1883, on the attached printed Abstract of Record, and the printed arguments of the parties to be filed with the clerk of said court prior to the 5th day of January 1884, and that defendants motion to dismiss the case for want ot jurisdiction shall be submitted at the same time and in the same manner.

Witness our hands this 23rd day of November 1883.

H. S. MONROE AND STUART BROS., Attys. for Plaintiff,

SMITH & BEESON, Attys. for Defendant.

1. Pleas in the Circuit Court of the United States for the District of Iowa, Western Division, at a Term thereof began and holden in the city of Council Bluffs in said District, before the Hon. James M. Love, Judge, on the 4th day of October, 1882.

H. K. Love,
Clerk.

2. Be it remembered that heretofore, to-wit: on the 3rd day of July, 1882, came David Dows & Co. by Stuart Bros. their attorneys, and filed in the office of the Clerk of said Court their petition against P. P. Johnson which said petition is in the words and figures following, to-wit:

In the Circuit Court of the United States, for the District of Iowa.

PETITION AT LAW.

David Dows,
Alexander E. Orr,
George C. Martin,
George B. Corksey,
David Dows Jr.,
J. Henry Norton,
Charles A. Munn,

Partners doing business under the firm name and style of David Dows & Co.,

Plaintiffs.

vs.

P. P. Johnson,

Defendant.

To Said Court:

Your petitioners David Dows, Alexander E. Orr, George C. Martin, George B. Corksey, David Dows Jr., J. Henry Norton, and Charles A. Munn, partners doing business under the firm name and style of David Dows & Co., state that each and all of said plaintiffs are non residents of the State of Iowa.

That David Dows, Alexander E. Orr, George C. Martin, George B. Corksey and David Dows Jr., members of

said firm, are residents and citizens of the State of New York.

That J. Henry Norton and Charles A. Munn, the other members of said firm, are residents and citizens of the State of Illinois.

That the principal place of business of said firm in the west is located at Chicago, in the State of Illinois.

That the defendant P. P. Johnson is a resident and citizen of the county of Montgomery in the State of Iowa.

That the amount in controversy in this suit exceeds the sum of five hundred dollars, exclusive of costs.

Petitioners aver and claim that the said defendant, P. P. Johnson, is justly indebted to them in the sum of seven thousand and five hundred dollars, and for cause of such claim state that heretofore, to-wit: on or about the 25th day of December, 1881, and for a long time prior thereto, petitioners were the owners of ten thousand bushels of sound merchantable ear-corn, stored in good covered cribs, numbered 1 and 2, and located on lots owned by F. L. and D. R. Stetson, situated in the town of Greenwood, county of Cass, and State of Nebraska; and that each of said cribs was marked with the name of David Dows & Co.

That on or about the 25th day of December, 1881, the said defendant, P. P. Johnson, without the knowledge or consent of plaintiffs, and without any authority, whatever, from plaintiffs, took possession of, and shipped, sold and disposed of the same.

That at the time that said defendant thus wrongfully took possession of and converted said corn to his own use, he had full knowledge of the fact that plaintiffs were the owners thereof.

That said corn was of the value of about seventy-five cents per bushel; wherefore by reason of the said wrongful acts of the said defendant, above stated, plaintiffs have been damaged in the sum of seven thousand and five hundred dollars, for which amount they demand

judgment against the said defendant. with interest and costs.

COUNT SECOND.

The plaintiffs claim of and from the defendant P. P. Johnson, the sum of seven thousand and five hundred dollars and for cause of such claim state:

That heretofore, to-wit: on the 20th day of November 1880, plaintiffs made and entered into a written contract with F. L. Stetson & Co. of Greenwood in the State of Nebraska, a firm composed of F. L. Stetson and D. R. Stetson, whereby plaintiffs employed said F. L. and D. R. Stetson to purchase for them. plaintiffs. such quantities of sound ear-corn at Greenwood in the State of Nebraska, as plaintiffs should deem advisable. That by the terms of said written contract, said F. L. and D. R. Stetson agreed to purchase said corn for plaintiffs and store the same in cribs, and mark the said cribs with the name of David Dows & Co. all of which will more fully appear by reference to a copy of said written contract which is hereto attached, and marked Exhibit "A", and made part of this petition.

Petitioners further state that in pursuance of the terms of said contract they furnished to said F. L. and D. R. Stetson large sums of money to be used in the purchase of corn, and that F. L. and D. R. Stetson proceeded, in pursuance of said contract, to purchase and crib for plaintiffs a large amount of corn. That on and prior to the 24th day of November 1880, said Stetsons had purchased for plaintiffs ten thousand bushels of sound merchantable ear-corn, and had stored the same in good covered cribs numbered 1. and 2. located on lots owned by said Stetsons in the said town of Greenwood in the county of Cass, and state of Nebraska, and had marked each of said cribs with the name of David Dows and Co. whereby plaintiffs became the sole owners of said ten thousand bushels of corn.

That on the said 24th day of November 1880 for the purpose of fully identifying the said ten thousand bush-

els of corn which said Stetsons had purchased and cribbed for plaintiffs as aforesaid, the said F. L. Stetson and D. R. Stetson executed and delivered to plaintiffs, a crib certificate, or crib receipt, wherein they certify and state that they have purchased for plaintiffs ten thousand bushels of sound merchantable ear-corn, and stored the same in the cribs above described, at the place above described, and have marked the same with the name of David Dows & Co., whereby said Stetsons delivered to plaintiffs the said ten thousand bushels of corn, all of which will more fully appear by reference to a copy of said crib certificate.

That afterwards, to-wit: on or about the 25th day of December, 1881, the said defendant, P. P. Johnson, with full knowledge of the fact that plaintiffs were the owners of the said ten thousand bushels of corn, and without the knowledge or consent of plaintiffs and without any authority from them whatever so to do wrongfully took possession of said ten thousand bushels of corn and shipped and sold, and converted the same to his own use.

That said corn was of the value of about seventy-five cents per bushel, whereby plaintiffs have been damaged in the sum of seven thousand five hundred dollars, for which sum they ask judgment with interest and costs.

STUART BROTHERS,
Attorneys for Plaintiffs.

I, T. M. Stuart one of the attorneys for plaintiffs in the above entitled cause, do solemnly swear that as such attorney I have in my possession and under my control, the written contract and crib receipt mentioned in the foregoing petition, that I also have in my possession, and have read, several letters from the said F. L. and D. R. Stetson, and the defendant P. P. Johnson, in reference to the corn mentioned in the plaintiffs petition, and the shipment thereof by defendant. That I am authorized by plaintiffs to institute this suit: that in the manner above stated, I have become and am now acquainted with the facts stated in this petition, and that the same are true as I verily believe.

T. M STUART.

The foregoing affidavit was subscribed and sworn to before me, and in my presence by the above named T. M. Stuart, this 29th day of July, 1882. Witness my hand and seal notarial.

DELL STUART,
Notary Public in and for
Lucas county Iowa.

[SEAL]

EPHIBIT "A."

MEMORANDUM OF AGREEMENT

made November 20th, 1880, between David Dows & Co., and F. L. Stetson & Co., of Greenwood, in the State of Nebraska.

David Dows & Co. are to provide F. L. Stetson & Co. the money necessary from time to time to purchase such quantity of sound ear-corn at Greenwood, in the State of Nebraska, as David Dows & Co. shall deem advisable.

F. L. Stetson & Co. agree to make such purchase for David Dows & Co and use the money for no other purpose than the purchase of sound ear-corn as above stated, and the expenses necessarily connected therewith, and the corn so purchased shall be the property of David Dows & Co., and the cribs containing same shall be marked with the name of David Dows & Co.

It is further agreed between the above mentioned parties that F. L. Stetson & Co. as a compensation for their services in purchasing, handling, cribbing, shelling and shipping the above corn shall receive whatever sum may remain when the corn is sold by David Dows & Co. after David Dows & Co shall have received the moneys so invested and interest thereon at the rate of eight per cent. per annum, also one cent per bushel and all freight and other charges and expenses incurred by them.

And F. L. Stetson & Co. further agree in consideration of the premises, to guarantee David Dows & Co. against all loss on account of the purchase of the above mentioned corn and to make good to them their investments with interest; also one cent per bushel and such

charges and expenses as may have been incurred by them.

F. L. STETSON.
D. R. STETSON.

EXHIBIT "B."

Greenwood, Neb. Nov. 24th, 1880.—We have bought for David Dows & Co. ten thousand bushels of sound merchantable ear-corn, and have stored the same in good covered cribs, numbered 1 and 2, located on lots owned by ourselves situated in the town of Greenwood, county of Cass, State of Nebraska, and each of said cribs is marked with the name of David Dows & Co., 10,000 bushels.

F. L. STETSON,
D. R. STETSON.

And on the back of this instrument there is the following:

EXPOSURES WITHIN 100 FEET.

North 40 feet—Livery Stable; East 75 feet—Blacksmith shop office; 25 feet South no exposure; West, an office 25 feet; P. P. Johnson, Grain office 10 feet.

Size of crib, 80 feet long, 14x9 high, 14 wide. Capacity, 5,300 bushels each. Owner, F. L. Stetson & Co. Location, Greenwood, Neb.

And afterwards on the 23rd day of September, 1882. defendant filed in the Clerk's office of said court, his answer, which is in words and figures as follows, to-wit:

In the Circuit Court of the United States, District of Iowa, Western Division.

ANSWER OF DEFENDANT.

DAVID DOWS.
ALEXANDER E. ORR.
GEORGE C. MARTIN.
GEORGE B. CORKSEY.
DAVID DOWS, JR.,
J. HENRY NORTON.
CHARLES A. MUNN.
PARTNERS &C.
VS.
P. P. JOHNSON

Comes now the defendant in the above entitled cause, and for answer to plaintiffs' petition denies that plaintiffs ever were the owners of the corn described in said petition, denies that they ever had the possession or right to the possession of said corn, denies that said corn was worth seventy-five cents per bushel, denies that he wrongfully converted said corn to his use—but says he was the owner thereof and entitled to the possession.

Defendant therefore prays that plaintiffs' action be dismissed, and that he have judgment for costs.

CHAPMAN & BEESON,
Attys. for Deft.

THE STATE OF IOWA, } SS.
MONTGOMERY COUNTY. }

P. P. Johnson being first duly sworn, deposes and says, that he is the defendant in the above entitled cause. That he has read the foregoing answer, and that the allegations therein contained are true as he verily believes.

P. P. JOHNSON.

Subscribed and sworn to by P. P. Johnson this 23rd day of September, 1882, at Red Oak, Iowa.

F. BYRKIT,
[SEAL.] Notary Public.

And afterwards on the 29th day of September, 1882, defendant filed in the Clerk's office of said Court his amended answer which is in words and figures as follows, to-wit:

In the Circuit Court of the United States, District of Iowa, Western Division.

AMENDED ANSWER.

In the Circuit Court of the United States, for the District of Iowa.

DAVID DOWS,
ALEXANDER E. ORR,
GEORGE C. MARTIN,
GEORGE B. CORKSEY,

DAVID DOWS JR.
J. HENRY NORTON,
CHARLES A. MUNN,

Partners doing business under the firm name and style of David Dows & Co.,

Plaintiffs.

vs.

P. P. JOHNSON.

Defendant.

Comes now the defendant in the above entitled cause, and for amended and substituted answer to plaintiffs' petition, denies each and every allegation in said petition contained except such as are hereinafter admitted to be true. Defendant admits that on the 20th day of November, 1880, the said F. L. Stetson & Co. executed the memorandum of agreement and on the 24th day of the same month, they executed the crib receipts, both of which are referred to in plaintiffs' petition, and copies thereof attached as exhibits thereto.

SECOND COUNT.

Defendant further answering says, that said memorandum of agreement, and crib receipts were delivered to plaintiffs, at the same time, and were parts of the same transaction, and constituted but one contract.

That at the time said contract and crib receipts were delivered to plaintiffs, this defendant at the special instance and request of plaintiffs, guaranteed the performance of said agreement by said Stetsons, by writing on the back thereof, as follows, to-wit:

"For a good and valuable consideration by me received, I hereby guarantee the fulfillment of the within agreement. (signed)

P. P. JOHNSON.

That at the time said contract and crib receipt were so delivered to plaintiffs, they, in consideration thereof, furnished to said F. L. Stetson & Co., the sum of two thousand dollars, which was all the money they ever furnished under said contract. That said crib receipt

was given by said F. L. Stetson & Co., and accepted by plaintiffs as security for the performance of said agreement, and for no other purpose.

That the corn described in said crib receipt was all in the cribs before said F. L. Stetson & Co., received said two thousand dollars, and no part thereof, was bought or paid for with the money so received from plaintiffs, or any part thereof.

That said F. L. Stetson & Co. failed to comply with the terms of said contract, or to repay said two thousand dollars, and defendant, for the purpose of securing himself against loss by reason of his said contract of guarantee, and to secure other large sums of money which said F. L. Stetson & Co. were owing to him, purchased said corn of said F. L. Stetson & Co., and has been at all times since, and still is, ready and willing to pay to plaintiffs said two thousand dollars, with interest, commissions and expenses, as provided for in said agreement, and now offers to confess judgment for said amount. Defendant therefore asks judgment for costs.

SAPP & LYMAN, AND CHAPMAN & BEESON,
Attys. for Deft.

STATE OF IOWA. } SS.
POTTAWATTAMIE COUNTY: }

P. P. Johnson, being first duly sworn, deposes and says that he is the defendant in the above entitled cause, that he has heard the above answer read over, and the allegations therein contained are true as he verily believes.

P. P. JOHNSON.

Subscribed and sworn to before me this 29th day of Sept., 1882.

[SEAL] H. K. LOVE, Clerk,
By MANLAN KEY, D. C.

And afterwards on the 29th day of September, 1882, defendant filed in the Clerk's office of said Court a

NOTICE

of offer to confess judgment, which is in words and figures as follows:

In the Circuit Court of the United States, District of Iowa, Western Division.

DAVID DOWS,
ALEXANDER E. ORR,
GEORGE C. MARTIN,
GEORGE B. CORKSEY,
DAVID DOWS JR.,
J. HENRY NORTON,
CHARLES A. MUNN,

Partners doing business under the firm name and style of David Dows & Co.,

Plaintiffs.

vs.

P. P. JOHNSON,

Defendant.

To the above named plaintiffs, or to Stuart Bros., their attorneys: You are hereby notified that on the 25th day of September, 1882, the defendant in the above entitled action will offer in said Court to confess judgment in said cause, for the sum of two thousand four hundred and thirty dollars, and costs of said suit up to that date, provided said judgment shall be accepted in full of plaintiffs' demand against defendant in this action.

P. P. JOHNSON,
By CHAPMAN & BEESON,
his attys.

Received a copy of the within notice, September the 18th, 1882.

STUART BROS.,
Attys. for plaintiffs.

And afterwards on the 29th day of September, 1882, the defendant filed in the Clerk's office of said Court, an

OFFER TO CONFESS JUDGMENT.

which was in words and figures as follows:

In the Circuit Court of the United States, District of Iowa, Western division.

DAVID DOWS,
ALEXANDER E. ORR,
GEORGE C. MARTIN,
GEORGE B. CORKSEY,
DAVID DOWS, JR.,
J. HENRY NORTON,
CHARLES A. MUNN,
PARTNERS &C.
vs.
P. P. JOHNSON

Comes now the defendant in the above entitled cause and offers to confess judgment in favor of the plaintiffs for the sum of two thousand four hundred and thirty dollars.

P. P. JOHNSON,
Defendant.
By SAPP & LYMAN, AND CHAPMAN & BEESON,
his attys.

And afterwards on the 3rd day of October, 1882, the parties to said cause filed in the Clerk's office of said Court their

AGREEMENT TO WAIVE A JURY,

which is in words and figures, as follows, to-wit:

In the Circuit Court of the United States, District of Iowa, Western Division.

DAVID DOWS,
ALEXANDER E. ORR,
GEORGE C. MARTIN,
GEORGE B. CORKSEY,
DAVID DOWS JR.,
J. HENRY NORTON,
CHARLES A. MUNN,
Partners doing business under the firm name and style of David Dows & Co.,
Plaintiffs,
vs.
P. P. JOHNSON,
Defendant.

The parties to the above entitled cause hereby waive a jury, and agree to submit the issues to the Court for trial.

STUART BROS., Attys. for Plaintiffs.
HAPMAN & BEESON, Attys. for Defendant

And afterwards to-wit on the 4th day of October, 1882, this cause was submitted to said court upon the pleadings and evidence, and after considering the same the court therefrom made and filed the following:

FINDINGS OF FACT, AND CONCLUSIONS OF AW

which is in words and figures as follows to-wit:

In the Circuit Court of the United States, District of Iowa, Western Division.

DAVID DOWS.
ALEXANDER E. ORR.
GEORGE C. MARTIN.
GEORGE B. CORKSEY.
DAVID DOWS JR.
J. HENRY NORTON.
CHARLES A. MUNN.

Partners doing business under the firm name and style of David Dows & Co.,

Plaintiffs.

vs.

P. P. JOHNSON.

Defendant.

Be it known that on the fourth day of October, 1882, it being the 9th day of the September Term of said Court, the parties to this cause, having by writen stipulations, waived a jury, this cause was submitted to the Court upon the pleadings and evidence, from which the Court finds the following

FACTS.

Be it known that on the 4th day of October, 1882, it being the 9th day of the September Court, the parties to this action having filed herein their written agreement,

to waive a jury trial, and try the same to the Court, the cause was submitted to the Court upon the pleadings and evidence from which the Court finds the facts connected with this case to be as follows, to-wit:

1st. That on or about the 20th day of November, 1880, the plaintiffs made and signed the following written contract with F. L. and D. R. Stetson, to-wit:

Form E.—Memorandum of agreement made Nov. 20th, 1880, between David Dows & Co. and F. L. Stetson & Co., of Greenwood, in the State of Nebraska. David Dows & Co. are to provide F. L. Stetson & Co. with the money necessary, from time to time, to purchase such quantities of sound ear-corn at Greenwood, in the State of Nebraska, as David Dows & Co. deem advisable. F. L. Stetson & Co agree to make such purchases for David Dows & Co. and to use the money so provided for no other purpose than the purchase of sound ear-corn, as above stated, and the expenses necessarily connected therewith, and the corn so purchased shall be the property of David Dows & Co., and the cribs containing the same shall be marked with the name of David Dows & Co.

It is further agreed between the above mentioned parties that F. L. Stetson & Co. as a compensation for their services in purchasing, handling, cribbing, shelling and shipping the above corn, shall receive whatever sum may remain when the corn is sold by David Dows & Co., after David Dows & Co. shall have received the moneys so invested and the interest thereon at the rate of eight (8) per cent. per annum, also one (1) cent per bushel, and all freight and other charges and expenses incurred by them.

That F. L. Stetson & Co. further agree, in consideration of the premises, to guarantee David Dows & Co against all loss on account of the purchase of the above mentioned corn, and to make good to them their investments, with interest, also one (1) cent per bushel, and such charges and expenses as may have been incurred by them. (Signed) F L. Stetson.
D. R. Stetson.

2. That the defendant, P. P. Johnson, at or before the delivery of said contract to the plaintiffs made and signed the following written guaranty on the back thereof, to-wit: For a good and valuable consideration by me received, I do hereby guarantee the fulfillment of the within agreement by Stetson & Co.

[Signed] P. P. JOHNSON.

3. That at the date of the execution and delivery of the said contract and guaranty, and of the crib receipt, hereinafter set out, the said F. L. and D. R. Stetson, had and owned in a crib at Greenwood, Nebraska, ten thousand bushels of corn, the same having been purchased by said Stetsons, prior to any negotiations between them and plaintiffs.

4. That on or about the 24th of November, 1880, the said F. L. and D. R. Stetson made and signed a crib receipt for said cribs of corn in words and figures following, to-wit:

Greenwood, Nebraska, Nov. 24, 1880.

We have bought for David Dows & Co. ten thousand bushels of sound merchantable ear-corn, and have stored the same in good covered cribs, marked 1 and 2, located on lots owned by ourselves, situated in the town of Greenwood, county of Cass State of Nebraska, and each of said cribs is marked with the name of David Dows & Co.

F. L. STETSON,

10,000 bushels. D. R. STETSON.

N 2. C 995.—Exposures within 100 feet North 40 feet Livery Stable, East 75 feet Blacksmith shop, our office 25 feet—South no exposure—West, our office 25 feet, P. P. Johnson, Grain office 10 feet.

Size of crib—80 feet long—14x9 high—14 wide—Capacity 5300 bushels each. Owners F. L. Stetson & Co. Location, Greenwood, Neb.

5. That after all the aforesaid instruments had been signed, they were forwarded to the plaintiffs at the city of Chicago, with a draft on plaintiffs in favor of said Stetsons attached, for the sum of $2,000.00, which sum of money the said F. L. & D. R. Stetson did, on the 6th

day of December, 1880, receive thereon, for the purposes in said instrument set out and which sum has never been repaid to plaintiffs.

That afterwards for the purpose of securing this defendant, P. P. Johnson, against the guaranty made by him as aforesaid, and also to secure other large advances of money which said Johnson had made to them, said F. L. and D. R. Stetson executed to said defendant a chattel mortgage on the cribs of corn mentioned and described in said crib receipt.

7. That at the time the defendant took said mortgage he had actual notice of all the aforesaid written instruments made to plaintiffs; the receipt of said $2,000 from plaintiffs by said Stetsons; that Stetsons owned said cribs of corn when said crib receipt was executed and delivered, and that his mortgage rested on the identical cribs described in said crib receipt.

8. That said corn remained in said cribs until the fore part of December, 1881; that said crib was marked as in said crib receipt stated; that at different times between the date of said contract and December, 1881, agents of plaintiffs visited said Greenwood, Nebraska, to look after said corn, and to see that it was properly cared for.

9. That during the forepart of December, 1881, the defendant, for the purpose of securing himself under the chattel mortgage aforesaid, and with the intention, willingness and ability to pay the lien of the plaintiffs, and recognizing the same, took possession of said corn, with the consent of said Stetsons, and sold the same.

10. That defendant has ever been ready to pay the amount due plaintiffs, by reason of said contract, guaranty and crib receipt, that is, the sum of twenty-four hundred and thirty dollars, being the sum of $2,000 advanced, 8 per cent. interest, and 1 cent per bushel commission.

11. That said corn was shipped and sold by defendant without the knowledge or consent of plaintiffs.

12. That there were ten thousand bushels of corn in said cribs, worth forty-four (44) cents per bushel at the time the same was disposed of by defendant, and that just before the commencement of this suit it was worth sixty (60) cents per bushel.

13. That the said sum of money advanced by plaintiffs, with interest thereon, and commission as provided in said contract, and expenses incident thereto, now amounts to two thousand four hundred and thirty dollars, ($2,430.)

14. That the plaintiffs are therefore entitled to recover, in this action, the principal sum so advanced, with eight per cent. interest, commissions of one cent per bushel on said 10,000 bushels, and expenses as provided for in said contract.

15. That the plaintiffs are not entitled to recover the full value of the corn, as owners of the same.

Wherefore the Court finds as a matter of law, that the contract and crib receipt constitute a security for moneys advanced by plaintiffs, and that under the facts found above, plaintiffs are only entitled to recover from defendant in this case, the amount of money advanced by plaintiffs on said contract and crib receipt, together with interest and commissions as provided in said contract.

To which finding ruling and conclusion as to the law applicable to the facts found, plaintiffs at the time excepted, claiming that they were entitled to the value of said corn.

J. M. LOVE.
Judge.

JUDGMENT.

And afterwards to-wit: on the 4th day of October, 1882, the following proceedings were had and entered of record in said cause to-wit:

In the Circuit Court of the United States, District of Iowa, Western Division.

DAVID DOWS,
ALEXANDER E. ORR,
GEORGE C. MARTIN,
GEORGE B. CORKSEY,
DAVID DOWS JR.,
J. HENRY NORTON,
CHARLES A. MUNN,

Partners doing business under the firm name and style of David Dows & Co.,

Plaintiffs.

vs.

P. P. JOHNSON,

Defendant.

Now on this day, the parties hereto having heretofore filed their stipulation in writing, waiving a jury, and this cause having been tried to the Court, the same comes on for final hearing, and the evidence having been submitted, and after argument of counsel, the Court being fully advised in the premises, finds that the plaintiffs are entitled to recover of the defendant the sum of $2,430.00 and the costs of this suit to the 29th day of September, 1882, the date on which said defendant offered to confess judgment therefor, and that the defendant is entitled to recover all costs of this suit made afthr that date.

It is therefore by the Court considered, ordered and adjudged that the plaintiffs David Dows & Co. have and recover of and against the defendant P. P. Johnson, the sum of twenty-four hundred and thirty dollars damages, with interest thereon at the rate of six (6) per cent. per annum from this date, and the costs of this suit made prior to the 29th day of September, 1882, taxed at $14.75 and that execution issue therefor.

It is further by the Court considered, ordered and adjudged that the defendant P. P. Johnson, have and recover of and against the plaintiffs, David Dows & Co, all costs of this suit made after September 29th, 1882, taxed at $101.85 and that execution issue therefor.

Plaintiffs gave notice of appeal in open Court.

To which judgment plaintiffs at the time excepted claiming that they were entitled to judgment for the value of the corn taken by defendant

MOTIONS TO SET ASIDE JUDGMENT AND FOR NEW TRIAL.

And afterwards, to-wit, on the 4th day of Oct., 1882, plaintiffs filed in said court their motions to set aside judgment, and for new trial, which are in words and figures as follows, to-wit:

In the Circuit Court of the United States, District of Iowa, Western Division.

DAVID DOWS & CO.,
Plainiiffs,
vs.
P. P. JOHNSON
Defendant.

Come now the plaintiffs, and move the Court to set aside the judgment rendered herein and render judgment in their favor, and against the defendant for the full value of the ten thousand bushels of corn on the facts found by the court, and for cause of such motion assign the following:

1st. Under the facts found plaintiffs are entitled to judgment for the full value of the corn at the time it was taken by defendant.

2nd. Under the facts found by the Court, plaintiffs are entitled to judgment against the defendant for the highest price or value of said corn at any time between the time of said taking of said corn and the commencement of this suit.

3rd. The facts found by the court show that the said defendant, without the knowledge or consent of plaintiffs, took and converted to their own use plaintiffs corn, and hence he is legally liable to plaintiffs for the full value of said corn and plaintiffs are entitled to judgment therefor.

4th. The judgment is against the facts found and contrary to the law.

STUART BROS.,
Attys. for plaintiffs.

In the Circuit Court of the United States, District of Iowa, Western division.

DAVID DOWS & CO.,
Plaintiffs,
vs
P. P. JOHNSON,
Defendant.

Come now the plaintiffs, and subject to his motion for judgment filed herein, and expressly reserving his rights in said motion, moves the court to set aside the judgment in this cause and grant a new trial therein, and for cause of such motion says:

1st. The court erred in refusing to permit the plaintiff to prove by I. P. Wallace and other witnesses, that plaintiffs had made advances of money at the request of Stetsons, on corn contracts in Chicago, as shown by bill of exceptions.

2nd. The judgment rendered is against the facts found and contrary to the law.

3rd. Plaintiffs under the facts found were entitled to judgment for the full value of the corn in controversy.

STUART BROS.,
Attys. for Plaintiffs.

ORDER FOR SUBMISSION OF MOTIONS.

Afterwards to-wit: on the 4th day of October. 1882 in the same Court and cause, the following among other proceedings were had, done and entered of record.

In the Circuit Court of the United States, District of Iowa, Western Division.

DAVID DOWS & Co.,
Plaintiffs.
vs.
P. P. JOHNSON,
Defendant.

Come now the plaintiffs and file their motion for a new trial which said motion is by the Court, ordered to be fixed for hearing at the ensuing October term of this Court at Des Moines.

ORDER OVERRULING MOTION FOR NEW TRIAL.

Afterwards to-wit: on the 28th day of May, 1883, it being in vacation, the following order was filed with the Clerk of the United States Circuit Court for the Southern District of Iowa, Western Division, and by him entered of record, as appears by entry in Record Book No. 1, page 205, of the record of said Court.

In the Circuit Court of the United States, District of Iowa, Western Division.

DAVID DOWS & Co.,
Plaintiffs.
vs.
P. P. JOHNSON,
Defendant.

Now on this 28th day of May, 1883, there is filed the order of the Court, overruling the motion of plaintiffs for a new trial, and which order is in words and figures following to-wit:

In the Circuit Court of the United States, District of Iowa, Western Division.

DAVID DOWS & Co.,
Plaintiffs.
vs
P. P. JOHNSON
Defendant.

At the request of Judge Love, who presided at the trial, this motion for a new trial has been considered by the full bench, and upon such consideration the judges

concur in the opinion that the motion should be overruled. It is accordingly so ordered.

GEORGE W. MCCRARY.

Circuit Judge.

Afterwards, to-wit: on the 27th day of September 1883, in the same Court and cause the following, among other proceedings were had, done and entered of record.

In the Circuit Court of the United States, District of Iowa, Western Division.

DAVID DOWS & Co.,
Plaintiffs,
vs.
P. P. JOHNSON,
Defendant.

This cause having been heretofore submitted to the Court upon the motion for a new trial hereinbefore filed by the plaintiffs, it is now ordered by the Court that said motion be overruled, to all of which plaintiffs except.

PETITION FOR WRIT OF ERROR.

And afterwards to-wit: on the 4th day of August, 1883, the plaintiffs in said cause filed in the Clerk's office of said Court their petition for a writ of error, with the allowance of said writ endorsed thereon, which is in words and figures as follows, to-wit:

In the Circuit Court of the United States, District of Iowa, Western Division.

DAVID DOWS, & Co.,
Plaintiffs,
vs.
P. P. JOHNSON,
Defendant.

Come now David Dows & Co. plaintiffs in error by their attorney, T. M. Stuart, and says that in the record and proceedings in the above entitled cause lately tried before this Honorable Court, there is error to their prejudice, and they pray for a writ of error, and

citation in due form to the end that said cause may be removed to, and received and retried by the Honorable, the Supreme Court of the United States.

T. M. STUART.
Attorney for Plaintiffs in Errror.

CITATION.

And on the 4th day of August, the plaintiffs filed in the Clerk's office of said Court a citation which is in words and figures as follows:

UNITED STATES OF AMERICA—SS.

The President of the United States to P. P. Johnson:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court, for District of Iowa, wherein David Dows & Co. is the plaintiffs in error, to show cause if any there be, why the judgment rendered against said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James M. Love, Judge of said Circuit Court, for Iowa, this 2nd day of August, 1883.

J. M. LOVE,
Judge.

SERVICE OF CITATION.

On the 27th day of September, 1883, the following acceptance of service was indorsed on said citation:

Plattsmouth Nebraska, September 27th 1883.

We hereby accept service of the within citation in cause of David Dows & Co. vs P. P. Johnson.

SMITH & BEESON,
Attys. for Defendant.

CERTIFICATE OF CLERK.

In the Circuit Court of the United States. For the Southern District of Iowa, Western Division.

I, H. K. Love, Clerk of said Court for said District and Division, do hereby certify that the foregoing transcript contains full, true and complete copies of all pleadings, ordered filed in said cause, and all entries of record therein in a certain cause lately pending in said Court, wherein David Dows & Co. are plaintiffs, and P. P. Johnson is defendant, as full true and complete as the original of the same now remains on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the Seal of Said Court, at my office in Council Bluffs, in said District, this 12th day of November A. D. 1883.

[SEAL] H. K. LOVE,
Clerk of U. S. C. C., Southern District of Iowa. Western Division.

By MARSHALL KEY, Deputy.

ASSIGNMENT OF ERRORS.

In the Supreme Court of the United States, October Term, 1883.

In the Circuit Court of the United States, District of Iowa, Western division.

DAVID DOWS & Co.,
Plaintiffs,
vs
P. P. JOHNSON,
Defendant.

Come now the plaintiffs by their attorneys, H. S. Monroe and Stuart Bros., and assign the following as error in the proceedings and judgment of the Circuit Court in this cause, to-wit:

1. The Court erred in overruling plaintiffs' motion for judgment.

2. The Court erred in overruling plaintiffs' motion for new trial.

3. The Court erred in refusing to render judgment in favor of plaintiffs for the full value of the corn, as shown by the finding of facts.

4. The Court erred in finding and ruling that the written contract in evidence constituted in law a mortgage, or a mere security for the payment of the money advanced by plaintiffs thereon.

5. The judgment entered is contrary to the law, and the facts as found by the Court.

6. Under the facts as found by the Court, plaintiffs are entitled to judgment for the full value of the corn in controversy, as the owners thereof.

H. S. MONROE AND STUART BROS.,
Attys. for plaintiffs in error.

DEFENDANT'S MOTION TO DISMISS APPEAL.

In the Supreme Court of the United States.

MOTION.

DAVID DOWS & CO.,
Plaintiffs,

vs.

P. P. JOHNSON,
Defendant.

The defendant in the above entitled cause moves the Court to dismiss the appeal in said cause, for the reason, as appears from the record, that the amount in dispute is less than five thousand dollars. The Court finds that the highest price of the corn sued for at any time, was six thousand dollars, and that the defendant was at all times ready, willing and able and offered to pay to plaintiffs more than two thousand dollars, which leaves the amount in *controversy*, less than four thousand dollars.

No exception is taken by plaintiffs to the findings of facts by the Court.

W. F. SAPP with SMITH & BEESON,
Attorneys for Defendant.

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SUPREME COURT U. S.
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KENNETT, Clerk.

PLAINTIFFS' ARGUMENT.

SUPREME COURT OF THE UNITED STATES.

No. 1182.

DAVID DOWS & CO., Plaintiffs in Error.

vs.

P. P. JOHNSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA. WESTERN DIVISION.

IN THE
SUPREME COURT
OF THE UNITED STATES,
NO. 1182.

DAVID DOWS & CO., Plaintiffs in Error,

vs.

P. P. JOHNSON.

ARGUMENT OF H. S. MONROE AND STUART BROS., ATTORNEYS FOR PLAINTIFF.

STATEMENT.

This cause is submitted to the Court on printed argument in pursuance of the written stipulation of the parties which appears in the transcript. The *only* question in the case arises upon the following written contract:

Form E.—Memorandum of agreement made Nov. 20th, 1880, between David Dows & Co. and F. L. Stetson & Co., of Greenwood, in the State of Nebraska. David Dows & Co. are to provide F. L. Stetson & Co. with the

money necessary, from time to time, to purchase such quantities of sound ear-corn at Greenwood, in the State of Nebraska, as David Dows & Co. deem advisable. F. L. Stetson & Co agree to make such purchases for David Dows & Co. and to use the money so provided for no other purpose than the purchase of sound ear-corn, as above stated, and the expenses necessarily connected therewith, and the corn so purchased shall be the property of David Dows & Co., and the cribs containing the same shall be marked with the name of David Dows & Co.

It is further agreed between the above mentioned parties that F. L. Stetson & Co. as a compensation for their services in purchasing, handling, cribbing, shelling and shipping the above corn, shall receive whatever sum may remain when the corn is sold by David Dows & Co., after David Dows & Co. shall have received the moneys so invested and the interest thereon at the rate of eight (8) per cent. per annum, also one (1) cent per bushel, and all freight and other charges and expenses incurred by them.

That F. L. Stetson & Co. further agree, in consideration of the premises, to guarantee David Dows & Co against all loss on account of the purchase of the above mentioned corn, and to make good to them their investments, with interest, also one (1) cent per bushel, and such charges and expenses as may have been incurred by them. (Signed) F L. STETSON.
D. R. STETSON.

The *only* inquiry to be made in this case is, what is the proper legal construction of this contract? By reference to the pleading, you will see that the plaintiffs claim that by virtue of said contract, they were the owners of 10,000 bushels of corn in a certain crib. That the defendant wrongfully took and converted said corn to his own use, and hence they seek in this action to recover the value of said corn.

The defendant answers, admitting the taking and conversion of said corn, but says that plaintiffs were not the absolute owners of the same, but simply held the same as security for advances made by them to Stetson

& Co., the owners thereof. That he purchased said corn from Stetson & Co., subject to such advances, and has always been ready and willing to pay the same.

The cause was submitted to the court upon the pleadings and evidence and the court therefrom found *as a matter of law*, that said contract simply constituted a security for the money advanced by plaintiffs thereon, and that plaintiffs were not entitled to recover in this case, as the owners of said corn, but could recover the amount of advances made by them on said contract. The plaintiffs except to such ruling, claiming that by virtue of said contract they became and were the owners of said corn, and entitled to judgment for the full value thereof.

Judgment was entered for plaintiffs for $2,430.00 Plaintiffs file their motion to set aside this judgment and enter judgment in their favor for the full value of said corn, being sixty cents per bushel, the highest market value between the date of conversion and the bringing of this suit, and also subject to said motion, motion for a new trial. These motions were overruled, and plaintiffs appeal.

ARGUMENT.

The *only* question in this case, is this: Does the written contract between plaintiffs and Stetsons show *on its face* that it was understood and intended by the parties as a mortgage, to secure monies loaned or advanced by plaintiffs? It is conceded that it may be shown by parol evidence that a deed or bill of sale, absolute on its face was simply given as security for a debt, or for money loaned and that in such case it will only operate as a mortgage; but no such question arises in this case. It is not claimed that such *parol* evidence was offered or introduced in this case. There is no finding of the court based on such evidence. It is not claimed that the relation of debtor and creditor existed between plaintiffs and Stetsons at the date of said contract; it is not claimed that there was any conversation or correspondence between said parties in relation to the

borrowing or loaning of money at or before the date of said contract; it is not claimed that there was any evidence outside of the written contract showing the purpose for which it was executed or the intention of the parties thereto, and the legal conclusions of the court are based alone upon the language used in the written contract. Hence we will inquire what was the real intention of the parties expressed by them in this writing? This question is important to plaintiffs, not only in reference to the amount involved in this suit, but in numerous other similar transactions. The body of said contract is in print. It is but a copy of a contract which has been used by the plaintiffs in making (as they supposed,) numerous purchases of corn, by and through agents employed for that purpose, and hence they are interested in knowing whether or not they are the *owners* of such corn.

It will be conceded, in the first place, that the contract confers upon David Dows & Co. the *legal* title to all corn purchased *or turned over* to them under or in pursuance of its terms. It provides, in express terms, that the corn is to be purchased *for* David Dows & Co. with *their* money, and when so purchased shall be their *property*. They are given the exclusive right to sell and dispose of said corn. It would be difficult to prepare an absolute conveyance in clearer or stronger language. The contract further provides that such corn when purchased shall be placed in cribs, and said cribs shall be marked with the name of David Dows & Co. When this is done, it will be conceded that the actual possession of the corn passes to David Dows and Co., the marking of such cribs being a sufficient delivery even against creditors, of cumbrous articles of this character. In this case the court finds as a fact that the corn in controversy was in a crib, and that said crib was marked as provided in the contract. Then, we apprehend it must be conceded that by virtue of the contract and the acts of the parties, the plaintiffs acquired the legal title, the right of possession, and the actual posession of the corn in controversy. Then, as we understand the law, the

burden of proof is upon the defendant, to show if such is claimed, that this bill of sale was intended by the parties as a mortgage, simply as security for the repayment of the moneys that plaintiffs had advanced on the contract, and in order to sustain a defense of this character the proof should be clear.

" Clear proof is required before a court will treat an " absolute sale as a mortgage."

Price vs. Karns, 59 Ill., 276.

Henry vs. Hotailing, 41 Cal., 22.

Kent vs. Lasly, 24 Wis., 654.

Phillips vs. Craft 41 Ala., 477.

Shays vs. Norton, 48 Ill., 100.

Connell vs. Evil, 4 Blackford, 67

" A vendor who alleges that his absolute bill of sale " was intended as a mortgage, must make strict proof of " the fact. Having given the transaction this form, he " should be bound according to its terms until he shows " by evidence, clear and convincing, that both parties to " it really intended it should have a different effect, and " that it does not express their real contract."

Jones on Chattel Mortg., Sec. 32.

Purington vs. Akhurst, 74 Ill., 490.

Sewell vs. Price, 32 Ala., 97.

Brantley vs. West, 27, Ala., 542.

Williams vs. Cheatham, 19 Ark., 278.

Tricher vs Andrews, 31 Ark., 163.

Jones on mortgages of Land, Sec 335.

" In order to convert what appears to be a condition- " al sale into a mortgage, the evidence should be so clear " as to leave no doubt that the real intention of the " parties was to execute a mortgage."

Jones on Mortg. 1st vol. sec. 260.

" The burden of proof, to show that a deed absolute " upon its face was intended as a mortgage, is upon the " grantor."

" Haines vs. Thompson, 70 Penn. st. 434.

II.

As there was *no evidence* showing the object or purpose of the execution of said contract, it follows that before it can be declared a mortgage, such *intent* must clearly appear from *the language* used in said contract.

We will now call your attention to the other portions of this contract for the purpose of discovering where or in what language it *clearly appears* that this bill of sale was intended as a mortgage. After conveying an absolute title, it proceeds as follows:

It is further agreed between the above mentioned " parties, that F. L. Stetson & Co., as compensation for " their services in purchasing, handling, cribbing, shell- " ing and shipping the above corn, shall receive what- " ever sum may remain when the corn is sold by David " Dows & Co., after David Dows & Co. shall have received " the moneys so invested, and interest thereon at the rate " of eight per cent. per annum: also one cent per bushel " and all freight and other charges and expenses incur- " red by them."

Now, what is there in this language indicating that the parties intended that the instrument should operate as a mortgage? Is there any word or sentence in this portion of the contract indicating that Stetsons reserve or retain any right to or interest in *the property conveyed* or any right of redemption therein? It is agreed that they shall receive a *compensation* for their *services* in relation to the corn, and the amount of such compensation is made to depend upon the amount that plaintiffs should receive for the corn when they sold it; but we submit that there is nothing in this provision inconsistent with the plaintiffs' claim of absolute title to the property. When we say that by this provision the parties simply intended to agree upon certains rules whereby the amount to be paid Stetsons as a *compensation* for their services should be ascertained, do we not give it its only true and proper meaning? This construction

is in perfect harmony with the express agreement of the parties that the corn should be the property of David Dows & Co. It is true that they might have agreed upon a certain sum to be paid for such services. They might have agreed that one hundred dollars should be paid to Stetsons when said corn was sold by plaintiffs as a *compensation* for their services; but we suppose they might also legally contract that they should have the net profits of the transaction in payment for such services, and if this was their intention, will not the law so enforce it? Is it not true that whatever sum of money is paid or returned to Stetsons, is given them as a *compensation* for their services in purchasing the corn? This is the very language used by the parties, and how can we say that it does not express their intention; and is it not true that there is a clear, legal distinction between a contract of this kind, and one where the balance of the proceeds of the property conveyed is returned to the grantor upon the ground that he was the equitable owner of the property, or had the equity of redemption therein? Cannot one man be the absolute owner of personal property, and yet liable to pay another for services rendered in purchasing that property for him; and cannot the parties make a valid agreement that the amount to be paid for such services shall depend upon the amount realized by such owner on the re-sale of the property? Is there not a clear, legal distinction between a contract of this character and a mortgage? Such contracts are not infrequent; they are made daily, and we will now call your attention to the following cases and authorities to the effect that such contracts cannot be construed to be a mortgage. In Jones on Mortgages, vol. 1, sec. 270, we find the following statement of the law in regard to this question:

"In like manner an agreement by the grantee made "as a part of the transaction whereby he is to account "to the grantor for a portion of the profits which may "be realized on a re-sale of the premises if made within "a specified time, and requiring him to sell if a specified "price can be obtained, is not inconsistent with the

" vesting of the absolute title," citing McCauley vs. Porter, 71 N. Y., 173.

In the New York case, above referred to, the court says that this reservation of a portion of the "*profits*" arising from the sale of the property, was not a reservation of any right to or interest in the property.

" Where a grantee gives back a writing, the purport " of which is, that he will at his election, either re-con- " vey upon payment of his debt, or sell the land, pay " himself from the proceeds and pay over the balance to " the grantor; this is no mortgage."

1st Hillard on Mortgages 23, Sec. 19.

Fuller vs. Pratt, 1 Fairf., 197.

" If a conveyance were intended as a payment, and " not as a security, it will not be held a mortgage by " reason of a covenant to convey to a purchaser found " by the grantor, within one year, on receipt of the pur- " chase money and interest, or otherwise, to pay such " other sum as arbitrators should award."

Baker vs. Thrasher 4. Den., 493.

S. P. Whitney vs. Townsend, 2 Lans., 249.

In the case of Miller vs. Baker, 20 Pickering, 285, the Syllabus states the facts as follows:

" I, C. S. in consideration of being justly indebted to " D. M. in the sum of, &c., secured to him by promissory " note, bearing date Oct. 1, payable in two years with in- " terest, as also in consideration of one dollar do by these " presents grant, bargain, sell, convey and confirm to " him the chattels to have and to hold the same to his " proper use, and I will warrant and defend the same to " him, of all which chattels I have put him in possession " by delivering him a part in the name of the whole. " Held that this was not a mortgage."

Shaw, C. J., in delivering the opinion, says:

" This instrument possesses all the characteristics of " an absolute sale and conveyance. There is no defeas- " ance or condition, which is an essential to the charac-

" ter of a mortgage. The implication arising from the " recital of an indebtness is too remote to make it a " mortgage."

" An absolute bill of sale and a bond to recover " upon payment of a certain sum at a given day, in the " absence of some proof of a loan of money or forbear- " ance, constitute a conditional sale and not a mortgage."

Thompson vs. Chumny, 8. Texas. 389.

Now in the light of these authorities let us enquire what are the obligations and rights of the Stetsons under this contract.

They are to purchase, crib, shell and ship this corn to David Dows & Co. This is what they are to do with this property of David Dows & Co. For this care and labor they are to receive what this property, when sold by David Dows & Co. shall bring, over and above the amount paid for the corn, and interest at eight per cent., and freight and other charges paid and incurred by David Dows. & Co., and one cent per bushel. The owners of the property, agree to pay the Stetsons a share of what the corn brings in the market for their labor in regard to it.

Suppose David Dows & Co. had bought, paid for and owned 10,000 bushels of corn, which lay in a pile at Greenwood, and had made a contract with the Stetsons by which they were to crib it and mark the cribs "David Dows & Co," shell and ship it to David Dows & Co., and for their services should have the same compensation as they were to have under this contract, would the legal situation of the parties have been any diffierent?

In the case supposed can there be any possible doubt as to Dows & Co's ownership of the corn?

III.

We now call your attention to the remaining portion of said contract. It reads as follows:

" And we further agree, in consideration of the " premises, to guarantee David Dows & Co. against all " loss on account of the purchase of the above mentioned

"corn, and to make good to them their investments with "interest; also one cent per bushel, and such charges "and expenses as may have been incurred by them."

Now, does this provision contain anything other than the guarantee of Stetsons that plaintiffs shall lose nothing in the transaction? Is it possible to construe it as an absolute agreement for the repayment of the purchase money, or for the payment of money loaned? If so, when is the money to be paid? When could the plaintiffs sue Stetsons for the money advanced by them?

Could they maintain a suit for losses in the transaction before such losses had occurred? Could they ascertain what the losses were without re-selling the corn?

Can any one read this provision of the contract and say that it was the understanding and intention of the parties thereto that David Dows & Co. had the right to call upon Stetsons at any time for the repayment of any money that they had advanced on the contracts, and that Stetsons were obligated to pay the same?

It is true that an agreement to repay money advanced on a contract, affords evidence of some weight tending to show that the transaction was intended as a mortgage; but it is also equally true, that the absence of such an agreement clearly indicates that the contract was *not* understood nor intended as a mortgage. Now here is simply a guarantee that plaintiffs shall not suffer any loss in the transaction. And Stetsons are not liable and cannot be made liable on such guarantee until after the corn shall have been sold by plaintiffs, and it shall have been ascertained that they have incurred a loss in the transaction. Stetsons would then be required to pay to plaintiffs the amount simply of such *loss or losses* and *not* the money advanced by plaintiffs for the purchase of the corn. We suppose that Stetsons had the legal right to make such guarantee if the plaintiffs demanded it But how can this have the effect to convert an absolute sale into a mortgage?

This guarantee provision, then certainly affords no evidence that the parties understood or intended the contract as a mortgage.

It simply indicates that in order to induce the plaintiffs to engage in a business transaction of this kind, Stetsons guaranteed that they would lose nothing in the end. But we submit that this is simply a guaranty against loss that may or may not ever occur, and that there is a clear distinction between such an agreement, and an absolute promise to repay or return the money advanced by plaintiffs.

Again. The "*loss*" referred to in this contract would not include a loss by fire; the language is, "all loss on account of the purchase of the above mentioned corn." It is evident that the parties had in view losses that might occur by changes in the market price of corn; and not losses caused by the destruction of the property after it had been delivered to plaintiffs, and without the fault of the other party.

But however this may be, we cannot believe that this clause in any way changes or modifies the preceding part of this contract, so far as the title to the corn is concerned.

First. David Dows & Co. are to place in the Stetsons hands money to purchase ear-corn.

Second. The corn, when purchased, is to be David Dows & Co's. corn.

Third. It is to be stored in cribs marked "David Dows & Co."

The money having been furnished, the corn having been bought with that money, and stored in cribs marked David Dows & Co., the Stetsons, for the right to receive all the corn brings in the Chicago market over and above its cost and interest and one cent per bushel, guarantee David Dows & Co. against loss; that is, that the corn will bring in the market enough to pay the cost of the corn, interest and one cent per bushel.

If the corn, when bought under this contract, was the property of David Dows & Co., it seems to us entirely plain that this guarantee in no way changes the contract in this regard.

Suppose a pair of horses which are for sale stand at my door, and A. who is a horseman, and I make an agreement by which I am to buy and pay $500 for the horses, which are to belong to me and be placed in my stable, that A is to take care of them for three months, and that I shall then sell them, and pay him for his services all I get over $500, interest and twenty-five dollars for my trouble, and he should guarantee that the horses would sell for enough to pay me the $500, interest and the twenty-five dollars, would this transaction be held to be a loan of money by me to A, I holding the possession of the horses as security for such loan.

We presume no lawyer would so decide. If such an agreement was made, *proved to be made*, for the purpose of covering up a usurious transaction, a different question would arise. Here is a fair, honest agreement, by which I furnish the money to buy the horses; they are to be mine, to remain in my possession; I am to sell them. A is satisfied, if I will do this, to care for the horses and guarantee me against loss, provided I will give him what is made on the horses over and above the $500 and interest and twenty-five dollars.

To us, it seems certain that no court would, on account of this guarantee, say that it was the intention of myself and A that these horses should be held by me as a security for money loaned A. We are unable to see any difference, in principle, between the case supposed and the case at bar. If there is any difference, to us the case at bar seems the stronger of the two to sustain the position that there was no intention to loan money or take security in the transaction.

IV.

It is further claimed that the fact that the corn in controversy was owned by Stetsons and in the crib at the date of the execution of the within contract, is a circumstance tending to show that the transaction was intended as a mortgage. Now we must insist that this circumstance has no weight in the determination of this question. It simply shows that the Stetsons concluded

to turn over this corn to plaintiffs on the terms specified in the contract, and it mrkes no difference, when or with whose money it was purchased, if it was delivered or turned over to plaintiffs on the terms specified in the contract; then as between the parties thereto, must it not be treated and considered as corn actually purchased under the contract? Must not the rights of each party in and to said corn, or the proceeds thereof be determined by the contract? It has frequently been decided that a warehouse receipt issued by a warehouseman on and for grain purchased by himself, and owned by himself at the date of such receipt, has the same legal effect as if he never had any interest or title in the grain, but received it from the party to whom he issued such receipt. See

77 Illinois, 305.

66 Illinois, 216.

The contract provides for the purchase of corn by them for David Dows & Co., the storing of it in cribs to be marked David Dows & Co., and that the corn bought under the contract should be the property of David Dows & Co., and when they say that they have bought "for David Dows & Co. ten thousand bushels of sound "merchantable corn, and have stored the same in good "sound cribs," * * * and that each of said cribs is "marked with the name of David Dows & Co." they agree that this corn is bought under the contract, and is subject to its terms.

V.

It is further claimed that the fact that the defendant guaranteed the performance of this contract on the part of Stetsons is a circumstance tending to show that the transaction was intended as a mortgage. Now does this circumstance indicate anything except that plaintiffs desired some security that Stetsons would use the money so advanced for the purpose alone of buying corn for *them* and cribbing it, as provided in said contract? Plaintiffs were about to place in the hands of Stetsons a large amount of money to be invested for *them*, and they

simply desired the guaranty of Johnson that they would faithfully perform their duties as such agents. Such guaranties are not infrequent, and we insist that the fact that it was demanded in this case is a circumstance inconsistent with the idea that this transaction was intended as a mortgage. It indicates that plaintiffs intended and expected to obtain and recive *the corn*, and not the repayment of money loaned. If the latter was their intention, why did they not require a guaranty for the repayment of all moneys advanced by them on the contract in express terms? Why did they not fix a time when such payment should be made? Why did they not in one of said writings recite the fact that they had or expected to *loan* Stetsons a sum or sums of money.

The plaintiffs have learned by experience with a vast number of similar agents, that it is essential to their (plaintiffs) protection, that the agents be held absolutely responsible to them. If it was not so, the agents would become careless, often dishonest, and the quantity of corn reported as purchased would not be found when wanted, the quality would be inferior to the requirements of the contract, and it would be negligently cared for and wasted in the handling. It is no answer to these suggestions to say that for such misconduct the plaintiffs would have their remedy in the courts. The remedy is worse than the disease. The delay, uncertainty, vexation and expense of such litigation is intolerable to an active and prudent business man. He has a right to contract against it, and this is what the plaintiffs have done. But it may be said they have gone farther than this, and taken a guaranty that requires the Stetsons to make good the investment, &c. Is it not a fact, inseparable from every commercial transaction in which there is the least element of speculation, that the parties graduate their risks to the profits they anticipate? What more have the parties done in this case? We do not know whether plaintiffs borrowed the money used in this business or not, but we do know that the current rate of interest during the time this business was being transacted, was, in the city of

Chicago, plaintiffs place of business, about eight per cent. per annum. That is about what the money was worth, and, if they borrowed, about what it cost them. The profits which it was possible for them to realize under this agreement were fixed and certain. Not only so, they were certain to be very small. Was it not natural, and reasonable for them to limit their risk in accordance with the small profits they anticipated from the business? On the other hand, the other party anticipated large profits, reasonably too, as the sequel shows. Was it not equally natural that they should be willing to assume risks, inseparable from the business and which must be assumed by one or the other party, but which the plaintiffs refused, and could not afford, to assume? The profits to one party are certain to be so small that he cannot afford to take any risk. But the risk is in the business and cannot be gotten rid of. Now, why should not the other party be permitted to assume it if he sees fit to? And if he does so, is his contract to be tortured into something different at his pleasure? Why should some different intention, from that which the language plainly imports, be imputed to the parties, when the plain and ordinary meaning of the terms they have employed, evinces an intention which arises so naturaly, reasonably and inevitably out of their situation? In order to exempt the plaintiffs from the risks they refused, and could not afford, to assume; and, in order that they might obtain the chance for large profits they thought the business would produce, the Stetsons have guaranteed the plaintiffs against loss in the transaction. This is the plain import of the language the parties have used and is the natural product of their situation and circumstances; while to say that this provision is a promise to repay a loan of money is, in our opinion, entirely inconsistent, not merely with the terms of the agreement, but also with the general purpose of the parties, their situation and circumstances. It is the substitution of a new agreement made for, not by, the parties; and one which their situation shows plainly enough, both parties would not have assented to.

VI.

Was the contract in fact designed to accomplish the purpose of transferring an interest in the property, from Stetsons to plaintiffs, or was it merely intended by the parties to create an agent, define his powers, prescribe the obligations of each of the parties and fix the compensation, or basis of compensation, of the agent. It is clearly the latter in point of form. Why should it not have that effect? There is neither averment nor finding of any fraudulent purpose entertained by either party; nor any legal obstacle in the way to the making of the precise agreement they desired to make, thus furnishing a motive for giving to the transaction a form different from its true character.

There was no averment, nor any finding that Dows & Co. at any time contemplated the acquisition of any corn or any interest in corn *from the Stetsons*.

The Stetsons' report (see 4th finding of facts) is the strongest possible declaration, over their own signature, that they had purchased the corn after the execution of the agreement and pursuant to its terms.

Now, can it be said, in any kind of reason, that the Stetsons could enlarge their rights or diminish the rights of the plaintiffs by delivering their own corn, and reporting the same as having been purchased pursuant to the terms of this contract? Is it not more just, more reasonable, and perfectly consonant with legal principles to say that the Stetsons in this transaction, acted in a dual capacity—and as the agents of the plaintiffs, they *purchased* this corn from themselves pursuant to the terms of the agreement; and that the rights of the parties to this transaction were precisely the same as if the corn had been purchased from third persons?

It is elementary in the law of contracts, that the agreements of parties will be interpreted, construed and enforced against each party in that sense in which he had reason to believe the other understood and interpreted it.

Story, 5th Ed., Sec. 775.

Is it not apparent from this record, that the plaintiffs understood the corn was to be and had been *purchased* by the Stetsons pursuant to the terms of the agreement; and is it not equally apparent the Stetsons knew that was their understanding? The question admits of nothing but an affirmative answer.

VII.

The paper called a "crib receipt" is simply a report of the agent as to the number of bushels of corn he had purchased under the terms of the contract. It does not possess any of the important elements or features of a wtre-house receipt.

It does not purport to be a receipt for corn held for storage. On the contrary, it declares the corn has been *purchased for plaintiffs.*

It does not state the corn is in the possession of the parties signing it. On the contrary, it states the corn has been deposited in cribs marked with the name "David Dows & Co." thus showing a delivery into the possession of the plaintiffs.

It contains no undertaking to deliver the corn upon a surrender of the instrument duly endorsed—which is an essential feature of a warehouse receipt.

There is not one factin the record showing that the Stetsons were keepers of a public warehouse.

Now what ground was there for treating the instrument as a warehouse receipt, and entering upon an inquiry to ascertain whether the delivery of it was intended to pass the absolute title to the property, or was only intended to create a lien, by way of a pledge of the property? Absolutely none. The parties never entertained a thought upon the subject, for it was not contemplated it would have the slightest effect in *transferring* the title to, or any interest in, the corn. It is simply a report from an agent to his principal stating what had been done pursuant to the employment. Nothing

else can be made of it, without striking out of it, its essential features and injecting into it language the parties never thought of.

Suppose that instead of furnishing these printed forms the plaintiffs had written to the Stetsons, requesting a report from them, and that the Stetsons had replied in the ordinary form of a letter, stating therein just what is stated in this paper—would anyone call it a crib-receipt or a warehouse-receipt? And, would a court entertain for a moment a contention as to whether the delivery of the letter was made with the intention of passing an absolute title, or only with the intention of pledging the property for the payment of a sum of money? I think not. The answer would inevitably be, that the letter being a mere report of the agent, neither intention could be ascribed to it. So, I think, it must be in this case. The plaintiffs have similar relations with a large number of persons throughout the northwest, and these formal reports are required merely for the purpose of keeping plaintiffs advised as to the state of the business, the memoranda as to exposures, being given to enable plaintiffs to effect insurance.

We contend, therefor, that in this case we have only to deal with an agreement of agency, and that the plaintiffs acquired an absolute title to the corn, converted by the defendant, by virtue of the *fact* that they had purchased the same through their agents. *Qui facit per alium, facit per se.* Cool et al. vs Phillips, 66 Ill., 216-18.

VIII.

It the conclusion above reached, that the relation of principal and agent was the true relation of the parties is sound, then it will not be doubted that they had it in contemplation to acquire an absolute title to all corn purchased by the Stetsons pursuant to the agreement, and that the title thus acquired should immediately vest in one or the other, or both of the parties to the agreement. So, the true question in the case, in my judgment, is: What did the parties intend in respect to the

title thus to be acquired? Must not the answer to this question be found in the writing--and must it not be in accord with the *terms* the parties have employed? Upon what principle of law can it be held, that the intention of the parties to this agreement was anything different from what their language clearly imports? Is there such inconsistency between its different parts, or is the intention so manifestly inconsistent with the language employed, as that a court may reject the language or a portion of it? We are unable to discover anything in the remotest degree resembling such inconsistency. But we do not need to cite authority to the proposition, that in the absence of such inconsi-tency the *terms* of the contract must control.

Was it, then, the agreement and intention of the parties to this instrument, that the corn purchased by the Stetsons pursuant to it, should be purchased *for* plaintiffs, and when so purchased be the *property* of plaintiffs? Or, was it the intention that by such purchase the plaintiffs should acquire only a lien, in the nature of a pledge, and the general title be acquired by the Stetsons? But for the acknowledged learning of the Circuit Court, whose judgment we question in this instance, we should have felt that any doubt upon this question was imaginary or captious. The terms seem to us to be as plain and free from ambiguity as it would be possible, in our language, to make them. It will certainly not be contended the parties could not legally make such an agreement and, under which, the title to the corn should vest absolutely in the plaintiffs. How? By clearly declaring their intention in the agreement. But what could they have said, that is not found in this agreement, to make that intention clear? We invite the other side to suggest a sentence or word, that, added to the agreement as it is written, would make the intention that the title should vest in the plaintiffs, appear more clearly than it now appear.

That the parties intended the plaintiffs should be the unqualified owners of the corn, is so natural, reasonable and just, in view of the obligations it was contem-

plated each should perform, that it seems to us to be an irresistible inference. The property was to be acquired by purchase, to accomplish which plaintiffs were to furnish all of the money necessary to pay the first cost of the corn and all incidental expenses. Is is not most natural and just, that the person who furnishes all of the money with which property is acquired, should insist upon being the owner of it, and that another person who does nothing but render services in respect to the property, should be satisfied with an arrangement by which his services would be compensated? I think that no arrangement could have been made between the parties, more perfectly in accord with, and appropriate to, the situation, circumstances and mutual undertakings of the parties. No reasonable and fair person, in the position of the Stetsons, could object to such an arrangement, and it was only prudence on the part of the plaintiffs to demand it.

In order to expound the contract according to its true meaning, it is necessary to interpret and construe all of its parts together. The different provisions should be reconciled into harmony with each other. No portion of the agreement should be suppressed by giving undue prominence and effect to another portion, but each part should be given full effect according to the intention of the parties. These propositions are so elementary they need not supported by citations. But, if it is held that the plaintiffs had only a lien upon this property, what becomes of the provision that the Stetsons "*Agree to make such purchases for David Dows & Co.*" and the provision: "*And the corn so purchased shall be the property of David Dows & Co.?*" Are they not completely suppressed, and is not the contract read as it they were no part of it? What provision does the contract contain from which an inference can be drawn, that by the purchase of corn pursuant to this agreement, the Stetsons should acquire the general title to, or any interest in the corn? The construction contended for by plaintiffs gives effect to every part, and all of the terms, of the contract, while it imports nothing into it the parties have not formally and plainly placed there.

To illustrate our position in respect to this part of the agreement a little further, let us suppose the plaintiffs had employed a third party to purchase the corn in the country, and that it was to be delivered by the vendors at Greenwood, and that the Stetsons were employed to receive, handle, crib, shell and ship the corn under precisely the same terms as to compensation and guaranty as are contained in this agreement. Could it be fairly claimed the Stetsons would thereby acquire the general title and the plaintiffs only a lien? No doubt, the other side will readily admit it could not. Yet, this is precisely what, in legal contemplation, the parties did do, except that the transaction was accomplished by one agent instead of two. But in what way could this difference create any legal distinction or modify the rights of the parties in respect to the property?

IX.

Thus far we have been endeavoring to show that there is nothing on the face of the contract, or in the findings of the court, to justify the conclusion that said contract can be construed as a mortgage. We will now call your attention to the following well-settled rules of construction which, we think, clearly forbid such construction.

FIRST.

It is a well-settled rule of law that the question, whether or not a transaction was intended as a sale or a mortgage, must be determined *alone* upon the facts existing at the date of such transaction.

The character of this contract, then, was fixed at its inception. The law will not permit the parties to speculate upon the chances attending the transaction. If this was intended as a sale, at the time it was made, Stetson & Co. can not, upon finding that the property has increased in value, call it a mortgage. See

Jones on Mortgages, 1st vol., sec. 256.

Hence, the fact that this corn is now worth more

than plaintiffs paid for it in November, 1880 does not aid us in the determination of this question.

SECOND.

"The fact that the consideration is fully equal to "the value of the property, is evidence of some weight "that the transaction was a sale and not a mortgage, be- "cause men in making a loan do not usually advance "the full amount of the property."

Jones on Mortgages, 1st vol., sec. 275.

Carr vs. Rising, 62 Ill., 14, 19.

"When a bill of sale is made for the full price of "the property and no evidence of indebtedness is given, "and there is no covenant to repay, this fact indicates "an absolute sale; or, if there be an agreement to re- "cover, a conditional sale."

Jones on Chattel Mortg., sec. 29.

Scott vs Britton, 2d Yerg., (Tenn.) 215.

"In distinguishing between a mortgage and a sale, "with liberty to repurchase, the court must be govern- "ed by the real intention of the parties. In ascertain- "ed this intention, there is one circumstance of great "weight: Was there a full price paid for the article "claimed to have been mortgaged?"

1 Cal., 250.

4 Hen. & Mun., 101 and 112.

7 Cranch, 241.

Ballard vs. Jones, 6 Hun., 455.

In this case it must be conceded that plaintiffs paid to Stetsons the full market value of this corn at the date of the contract. The contract clearly indicates that they are to pay the market value. Stetsons having marked this crib, and thus delivered the corn to platntiffs, under the contract drew upon plaintiffs for the same in the sum of $2,000, or twenty cents per bushel, and there is no claim that this was not the full value or cost of the corn at that time. The contract provides

that plaintiffs are to furnish the money necessary to purchase the corn, and the presumption is, that they intended to, and did in this case pay to Stetsons the full value of the corn at that time.

THIRD.

" A debt, either pre-existing or created at the time, " is an essential requisite of a mortgage. Where there " is no debt, and no loan, it is impossible to say that an " agreement to re-sell will change an absolute deed into ' a mortgage."

Jones on Mortgages, 1st vol., sec. 265.

Glover vs. Payn, 19 Wendell.

Conway vs. Alexander, 7 Cranch, 218.

Flagg vs. Mann, 14 Pick., 467.

Lund vs. Lund, 1 N. H., 39

Henley vs. Hotailing, 41 Cal., 22.

" The relation of debtor and creditor in respect to " the money which constitutes the consideration, of " itself, determines the character of the conveyance."

9 C. E. Gr., 387-397.

" In general, the idea of a debt or sum due is essen- " tial to characterize a contract as a mortgage."

1st Circ., (R. I.) 1846.

Almy vs. Wilbur, 2nd Woodb. & M., 371.

" The distinction between a mortgage and condi- " tional sale is, that if the relation of debtor and credit- " or remains, and a debt still subsists, it is a mortgage; " but if the debt is extinguished by the agreement of the " parties, or the money advanced was not by way of " loan, and the grantor has the privilege of refunding if " he pleases by a given time, and thereby entitling him- " self to a reconveyance, it is a conditional sale."

1858, Slowey vs. McMurray, 27 Mo., 113.

" To constitute a deed a mortgage, when such is ab- " solute on its face, it must be made to appear from the " instrument, or otherwise, that the transaction was

" originally intended as security for money; that it was " in fact, a mere loan of money."

Sup. Ct, 1866, Laxton vs. Hitchcock, 47 Barb., 220.

1 Allen, (Mass) 107.

It is not claimed that any debt existed between these parties at the date of said contract. It is not claimed that anything was said between them in reference to loaning or borrowing money. No such requests were made by Stetsons; no such proposition was made or accepted bp plaintiffs; and as we have seen, there is no such language found in their written contract. In the case of Low vs. Henry, 9 Cal. 538, the Court says:

" In the absence of a mutuality of obligation, it " must appear by apt and express words in the instru- " ment that it was the intention of the parties that the " transaction should amount to a mortgage."

Now, where does such "apt" words appear in this contract?

FOURTH.

A defeasance is an indispensable requisite of a mortgage.

" It may be in the instrument of conveyance or in a " separate writing, or it may exist in *parol* merely; but " it must, nevertheless, exist in some form. The grant- " or must have a conditional right to have the property " restored to him. There must be a valid and binding " agreement of some sort on the part of the grantee to " yield up the property received by him when the condi- " tions upon which the conveyance was made have been " performed, else there is lacking an element indispensa- " ble to a mortgage."

Jones on Mortgages, 1st vol. sec. 241.

Now, as we have seen there is no provision in this contract whereby Stetsons reserve any right to or interest in said property.

There is no provision that the conveyance shall become void on any contingency. There is absolutely no

word or expression in the contract indicating that the parties thereto ever intended or expected that the corn should be returned to Stetsons.

FIFTH.

A conditional transfer of title is essential to constitute a mortgage.

"A decisive test of a legal mortgage of *personal* "property is the use of language which makes the in- "strument one of sale upon condition, so that the sale "is defeated by the debtor's performance of his agree- "ment; or as is stated by some courts, so that by the mere "non-performance of the condition by the debtor, the "title is transferred absolutely to the creditor. If there "be no such transfer upon a condition, either express or "implied, the transaction is not a chattel mortgage."

Jones on Chattel Mortgages, sec. 8.

SIXTH.

While it is a general rule that in all doubtful cases a contract will be construed to be a mortgage rather than a sale, because such construction will be most apt to attain the ends of justice and prevent fraud and oppression, yet this rule can have no application to this case, because the rights of Stetson & Co. are the same if the contract is a sale, as they would be if it is construed to be a mortgage. Their *compensation* is the same in one case as in the other. The amount that they will receive is the same in one case as in the other. The holding that the contract constitutes a sale, cannot operate to oppress them in any manner, nor to deprive them of any right which they would have if it is construed to be a mortgage.

But this rule has no application to cases where the intention of the parties can be ascertained from the contract.

Cornell vs. Hall, 22 Michigan, 377.

"A deed absolute, made to secure the payment of

" money, will be treated in equity as a mortgage only " where it is made to appear that it will operate as a " fraud upon and injure the grantor to enforce it accor- " ding to its terms."

Belote vs. Morrison, 8 Minn., 87. Gil., 62.

There is nothing unfair or unjust or oppressive in this contract, and we insist that there is nothing in it to justify a court in refusing to give effect to its plain provisions.

SEVENTH.

Intention the criterion. "The intention of the parties " is the only true and infallible test in determining " whether a conveyance can be a mortgage or a sale."

Turley vs. Bates, 2 H. & C., 200.

Martineau vs. Kitching, L. R. 7 Q. B., 449, 450, 454.

Fitch vs. Burk, 38 Vt., 689.

Young vs. Matthews, L. R., 2 C. B., 127.

Riddle vs. Varnum, 20 Pick. 283.

Fuller vs. Bean, 34 N. H., 300-304.

Stone vs. Peacock, 35 Maine 388.

Blackburn on sales, 150-151.

Bellows vs. Wells, 35 Vt., 599.

Sumner vs. Hamlet, 12 Pick. 76-82.

Morse vs. Sherman, 106 Mass., 433.

Jones on Mortgages, 1st vol., 258.

And it must appear that this was the intention of both of the parties to the contract.

" To make a sale purporting to be absolute, a mort- " gage, it is not sufficient that the party executing it " considered it as such. It must be so considered and " intended by all parties thereto."

Holmes vs. Fresh, 9 Mo., 201.

Then, in order to declare this contract to be a mortgage, the court must find that this was the understand-

ing and intention of David Dows & Co. when they entered into it. As there was no debt existing between the parties, it must appear that plaintiffs had large sums of money which they were exceedingly anxious to loan, and they adopted this method of loaning it. By reference to the original contract and crib receipt, you will see that the body of these instruments are in print—small blanks are left for the name of the party with whom they should contract the date of the contract and the number of the crib or cribs; and this fact clearly indicates that they were not specially prepared as a contract with Stetsons alone. Now, is it not simply impossible to believe that David Dows & Co. prepared these instruments to be used instead of a mortgage, with the view and intent of loaning money on them? The Court finds that they are commission merchants, doing business in Chicago, and the business of loaning money is outside of their regular business. Again, if they simply desired to loan their money, would there be any necessity of their going to Nebraska to loan it? Could they not meet with such opportunities nearer home? Could they not have obtained better security nearer home than a chattel mortgage on corn—property that is liable to waste and decay, and is fluctuating in its value? But, above all, would they go a thousand miles to loan two thousand dollars, to be secured by a chattel mortgage on corn in the crib, which is only worth two thousand dollars? If they desired to loan their money on mortgage security, why did they not demand and take a mortgage? Now, whatever may have been their object or purpose in making these contracts, we insist that it is simply impossible to believe that they were made with the object, purpose or design of loaning money thereon. With an instrument conveying to them the absolute title to this property, they are not called upon to explain why they chose to purchase it, or why they prepared the contract in the form it is in; but if such explanation were needed, it seems to us that it can readily be seen upon the surface of the transaction itself. They were engaged in buying and selling corn; this was their busi-

ness. It is reasonable to say that they desired to extend such business as far as their capital would permit. They desired to purchase corn corn at different points in States of Illinois, Iowa and Nebraska. They could not well send men to the different localities in those States to buy for them, for two very good reasons: First—They did not have, and could not, without a large expenditure of money, obtain the necessary cribs or warehouses at those points, in which to store such corn until it would dry out or be ready for shipment. Second—They found that men were located at all of these points, and engaged in this very business. They had all the cribs and warehouses necessary to successfully conduct the business, and their personal acquaintance with the people and business at such localities, would give them a decided advantage, besides if plaintiffs should send men to such localities it would likely bring about a competition in the trade that would result in raising prices, and prevent them from making any purchases; hence they were interested in employing just such parties to purchase for them. But this was difficult; these men desired to purchase for themselves. They were at home; they had their own cribs and warehouses in which they could take care of corn. They expected to make large profits on such purchases, and hence would not, under such circumstances, agree to purchase corn for others for the usual prices. They would not purchase for others for the usual compensation of one or two cents per bushel. Now, this contract was prepared with the view of avoiding the objections that were made by this class of traders, and inducing them to purchase corn for plaintiffs. By the terms of the contract they are to have the profits of the transaction as a compensation for their services and the use of their cribs, and this is just what they desired; and this we think we are justified in saying, was the clear understanding and intention of the Stetsons when they made and entered into this contract. They had no object in redeeming the corn. It was not a kind of property that they could keep for any length of time; it was purchased with the view and intent of selling it again, and they would realize fully as

much by having plaintiffs sell it as to redeem it and then sell it themselves, and hence they could have had no object in inserting in this agreement a provision permitting them to redeem.

To construe this contract as a sale, cannot injuriously affect nor in any manner prejudice the rights or interests of Stetsons; but to construe it as a mortgage will work absolute injustice to the plaintiffs. They have considered and treated this corn as their absolute property. They believed that they had the absolute and exclusive right to sell and dispose of it; and that the entire proceeds arising from a sale thereof must come into their hands. Hence, relying upon this view of the contract, they felt safe in making other contracts with Stetsons, and advancing other moneys to them or for their use, and now to evade a settlement of such other accounts with plaintiffs and avoid the payment of their just debts, they, in plain violation of their contract, turn over to the defendant, this 10,000 bushels of corn, and he takes it and sells it for $4,400, and very generously offers plaintiffs $2,430 of this money. If the instrument is a mortgage, the property is only liable for the mortgage debt; but if it is a sale, plaintiffs would have the right to retain the compensation that they were to pay Stetsons on any just demand they held against Stetsons, or to offset such demand against such claim for compensation. And *right here is the key to this case.* The only object that Stetsons had or could have had, in transferring this corn to the defendant, was to avoid the payment of other claims held against them by plaintiffs. Hence, we say, that to construe this contract to be a mere mortgage, would not only be in conflict with its language and terms, but would violate the intention of the parties and work absolute injustice to the plaintiffs.

DAMAGES.

The findings of the court show that this corn, at the date of the conversion, was worth 44 cents per bushel, or $4,400. The highest market price of said corn at the time and place of conversion, between the date of conversion and the commencement of this suit, was 60 cents per bushel, or $6,000. We regard the rule of law well established that in actions of trespass or trover for the

wrongful destruction or conversion of personal property, the wrong-doer is held liable for the highest market value of such property between the date of conversion and the commencement of suit, and some cases go so far as to hold him liable for the highest market value up to the time of trial; and hence if we are right in our construction of the contract, plaintiffs are entitled to judgment for $6,000.

But if we are mistaken in our view of this contract, if it be true that plaintiffs simply held said corn in security, then we inquire: Can the defendant, with the full knowledge of the existence and terms of such contract, take and dispose of such property and in an action brought against him for such wrong, compel plaintiffs to settle their accounts against Stetsons with him? He occupies the position of a trespasser, a wrong-doer. He has wrongfully deprived plaintiffs of their security. He has wrongfully deprived plaintiffs of their right to sell said corn, which is plainly given in the contract, whether it be construed as a morigage or bill of sale. We are well aware that in such actions by a lien-holder, his damages are limited to the amount of his lien; but this general rule does not apply in actions against a stranger, and it does not apply in actions by a lien-holder or special owner, or bailee, who is liable to account to another for the property or its value. Now under this contract plaintiffs would have the right to deduct from the proceeds of such corn not only the money advanced by them to pay for it, with eight (8) per cent. interest thereon, but one cent per bushel, and all costs and expenses incurred by them in relation to said corn. This would involve a settlement of all moneys that they had advanced as insurance, as expenses in the purchase and cribbing of the corn, and whatever might be the result of this suit, plaintiffs will have to account to Stetsons for the amount they receive for the corn according to the terms of the contract. Stetsons are not parties to this suit; they are not bound by the adjudication of these questions in this suit. Now, can a wrong-doer compel plaintiffs to make such settlement with him? We think not. Respectfully submitted.

STUART BROS. and H. S. MONROE,
Attorneys for Plaintiffs.

110-223

SUPREME COURT U. S.
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JAMES H. McKENNEY, Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1883.

DAVID DOWS, ET AL., *Plaintiffs in Error,*

vs.

P. P. JOHNSON, *Defendant in Error.*

POINTS AND ARGUMENT OF HENRY S. MONROE,

ON BEHALF OF PLAINTIFFS IN ERROR.

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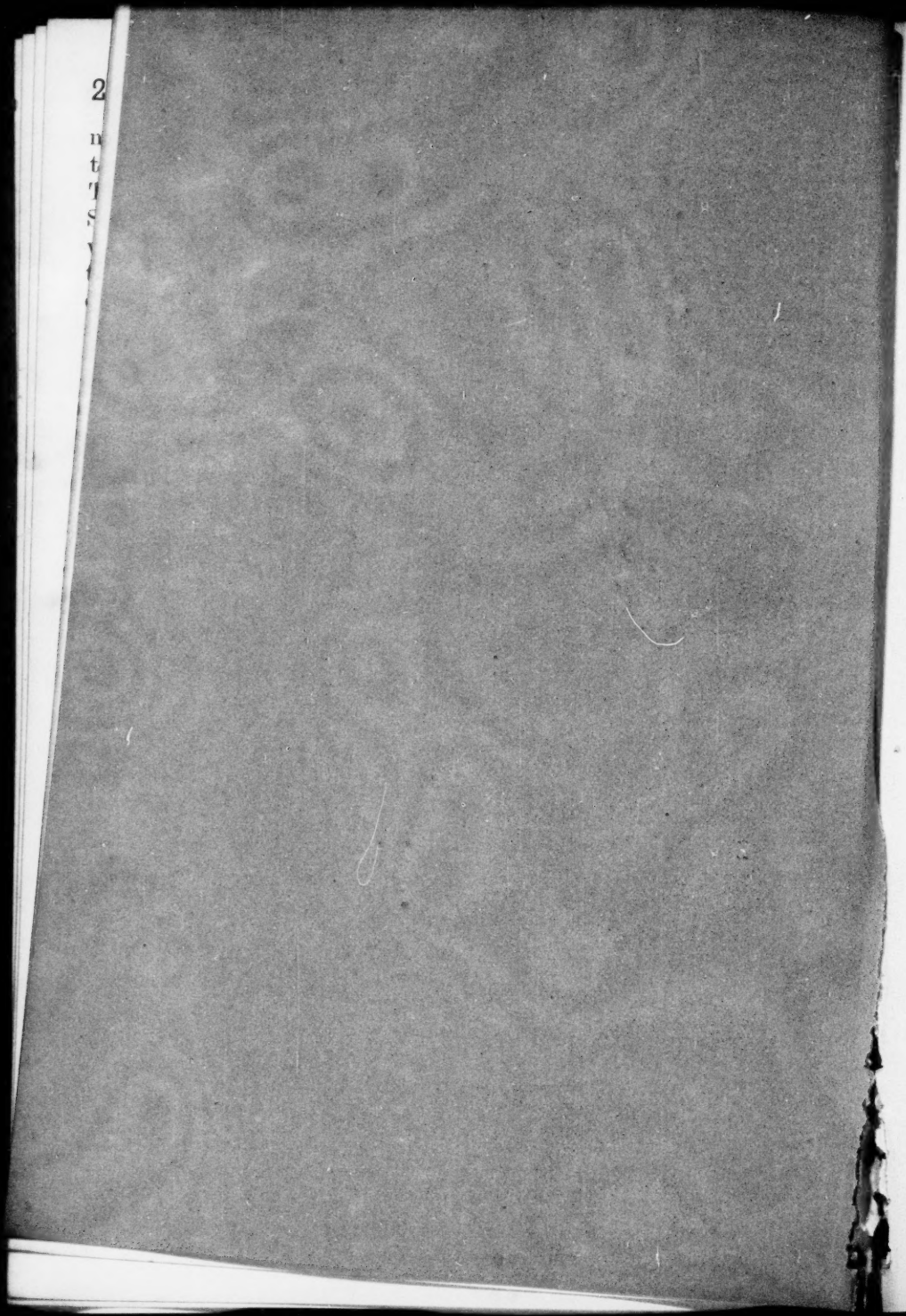

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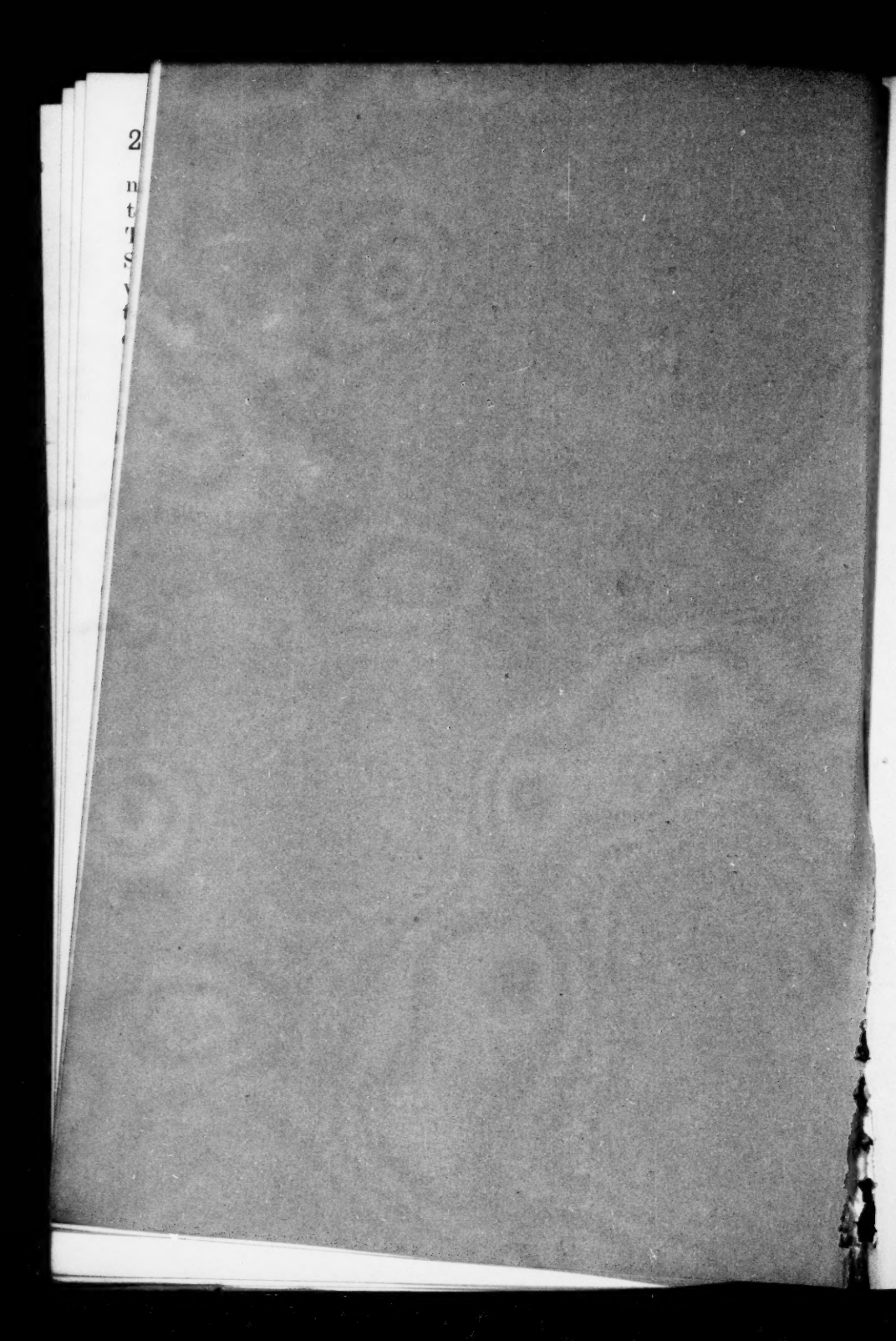
STATEMENT OF CASE.

This was an action of trover brought in the court below by David Dows & Co., against the defendant in error to recover the value of 10,000 bushels of corn, claimed by the plaintiffs in error to have been wrongfully converted by the defendant.

The plaintiffs in error are commission merchants doing business in the city of Chicago, and are in the habit of advancing large amounts of money for the purchase of corn and other grain throughout the north-western states.



IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1883.

DAVID DOWS, ET AL., *Plaintiffs in Error,*

vs.

P. P. JOHNSON, *Defendant in Error.*

POINTS AND ARGUMENT OF HENRY S. MONROE,

ON BEHALF OF PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

This was an action of trover brought in the court below by David Dows & Co., against the defendant in error to recover the value of 10,000 bushels of corn, claimed by the plaintiffs in error to have been wrongfully converted by the defendant.

The plaintiffs in error are commission merchants doing business in the city of Chicago, and are in the habit of advancing large amounts of money for the purchase of corn and other grain throughout the north-western states.

On and before the 20th day of November, 1880, the firm of F. L. Stetson & Company were doing business, and were dealers in grain at the town of Greenwood, in the state of Nebraska. On that day David Dows & Co. entered into the following agreement (marked Exhibit "A") with Stetson & Company, to wit:

EXHIBIT "A."

"MEMORANDUM OF AGREEMENT

"made November 20th, 1880, between David Dows & "Co. and F. L. Stetson & Co., of Greenwood, in the State "of Nebraska.

"David Dows & Co. are to provide F. L. Stetson & "Co. the money necessary from time to time to purchase "such quantity of sound ear-corn at Greenwood, in the "State of Nebraska, as David Dows & Co. shall deem ad- "visable.

"F. L. Stetson & Co. agrees to make such purchase "for David Dows & Co. and use the money for no other "purpose than the purchase of sound ear-corn as above "stated, and the expenses necessarily connected therewith, "and the corn so purchased shall be the property of "David Dows & Co., and the cribs containing same shall "be marked with the name of David Dows & Co.

"It is further agreed between the above mentioned "parties that F. L. Stetson & Co. as a compensation for "their services in purchasing, handling, cribbing, shelling "and shipping the above corn shall receive whatever sum "may remain when the corn is sold by David Dows & Co., "after David Dows & Co. shall have received the moneys "so invested and interest thereon at the rate of eight per

"cent. per annum, also one cent per bushel and all freight "and other charges and expenses incurred by them.

"And F. L. Stetson & Co. further agree in considera- "tion of the premises, to guarantee David Dows & Co. "against all loss on account of the purchase of the above "mentioned corn, and to make good to them their invest- "ments with interest; also one cent per bushel, and such "charges and expenses as may have been incurred by "them.

"F. L. STETSON.
"D. R. STETSON."

On that day David Dows & Co. paid to Stetson & Co. $2,000 for 10,000 bushels of corn then owned by the Stetsons, and took therefor the following so called "crib "receipt" (which is marked Exhibit "B"), to wit:

EXHIBIT "B."

"GREENWOOD, Neb., Nov. 24, 1880.

"We have bought for David Dows & Co. ten thou- "sand bushels of sound merchantable of corn, and have "stored the same in good covered cribs, numbered one "and two, located on lots owned by ourselves situated in "the town of Greenwood, county of Cass, State of Ne- "braska, and each of said cribs is marked with the name "of David Dows & Co. 10,000 bushels.

"F. L. STETSON,
"D. R. STETSON."

The two instruments bear the same date, and form a part of one transaction. The Stetsons then procured

the defendant Johnson to make the following written guaranty on the back of the contract:

"For a good and valuable consideration by me re-
"ceived, I do hereby gurantee the fulfillment of the writ-
"ten agreement by Stetson & Company."

After this the Stetsons executed to Johnson a chattel mortgage on the corn mentioned in said "crib receipt," Johnson having full notice of all that had before occurred between David Dows & Co. and the Stetsons. In the forepart of December, 1881, Johnson, without the knowledge or consent of David Dows & Co., took possession of and sold the corn in question.

The case was tried by the judge of the court below without a jury, and he held the transaction between the Stetsons and David Dows & Co. to be a mortgage, and gave judgment for the $2,000 and interest, and the one per cent. per bushel mentioned in the contract.

To reverse this judgment the writ in this case was prosecuted.

Assignment of Errors.

1. The court below erred in construing the contract and crib receipt introduced in evidence as a security for money.

2. The court below erred in finding the value of the corn in question at not over $6,000.

Points.

I.

The written contract between the parties, shown by Exhibits A and B, shows on its face that it was intended, by the parties to it, that the corn mentioned therein should be the sole and absolute property of David Dows & Co. There being no parol evidence tending to show it was intended as a mortgage, the intention as shown by the contract must govern. Indeed, the intention of the parties is the only true test in determining whether or not a conveyance is a mortgage or a sale.

Turley v. *Bates*, 2 H. & C., 200.
Martineau v. *Kitching*, L. R., 7 Q. B., 449, 450, and 454.
Fitch v. *Burke*, 38 Vt., 689.
Young v. *Matthews*, L. R., 2 C. B, 127.
Riddle v. *Varnum*, 20 Pick., 283.
Fuller v. *Bean*, 34 N. H., 300–304.
Stone v. *Peacock*, 35 Maine, 388.
Blackburn on Sales, 150, 151.
Bellows v. *Wells*, 35 Vt., 599.
Sumner v. *Hamlet*, 12 Pick., 76–82.
Morse v. *Sherman*, 106 Mass., 433.
Jones on Mortgages, 1st Vol., 258.
Holmes v. *Fresh*, 9 Mo., 201.

II.

Clear proof is required before a court will treat an absolute sale as a mortgage.

Price v. *Karnes*, 59 Ill., 276.
Henry v. *Hotarling*, 41 Cal., 22.
Kent v. *Lasly*, 24 Wis., 654.
Phillips v. *Craft*, 41 Ala., 477.
Shays v. *Norton*, 5 Blackford, 67.

III.

All the provisions of the contract fairly construed are absolutely inconsistent with the idea that anything like a mortgage was intended.

IV.

The fact that the contract provides that the Stetsons should for their services in shelling, cribbing, caring for the corn, &c., receive what the corn should bring in the market over a certain sum, is not inconsistent with the fact that the corn was the property of David Dows & Co.

Jones on Mortgages, 1 Vol., Sec. 270.
McCauley v. *Parker*, 71 N. Y., 173.
1st Hilliard on Mortgages, 23, Sec. 19.
Fuller v. *Pratt*, 1 Fairf., 197.
Baker v. *Thrasher*, 1 Den., 493.
G. P. Whitney v. *Townsend*, 2 Laws, 249.
Miller v. *Baker*, 20 Pick., 285.
Thompson v. *Chunny*, 8 Texas, 389.

V.

The fact that the corn in controversy was before and at the date of the contract owned by the Stetsons, amounts to nothing in determining the question whether or not the contract was or was not a mortgage.

Broadwell v. *Howard*, 77 Ill., 305.
Cool v. *Phillips et al.*, 66 Ill., 216.

VI.

The fact that defendant Johnson guaranteed the contract on the part of the Stetsons, does not under the circumstances even tend to show that the transaction was intended as a mortgage.

VII.

The paper called a crib receipt is simply a report of the agent of the amount of corn purchased by him for David Dows & Co. under the terms of the contract. It on its face declares that the corn has been purchased for David Dows, and stored in cribs marked David Dows & Co.—shows that the corn belongs to David Dows & Co., and is in their possession.

Cool et al. v. *Phillips*, 66 Ill., 216–18.

IX.

There is nothing on the face of the contract or in the findings of the court to justify the conclusion that this

contract was a mortgage; the following well settled rules applicable to this case forbid such a construction.

(*a.*) Whether or not a transaction is to be considered as a mortgage or a sale *must be determined alone upon the facts existing at the date of such transaction.*

Parties can not await the result of the chances of the business, and then choose.

Jones on Mtgs., 1 Vol., Sec. 265.

(*b.*) The relation of debtor and creditor did not exist between these parties in respect to the money paid for the corn, which of itself determines the character of the conveyance.

(*c.*) To constitute a deed absolute on its face a mortgage, it must be made plainly to appear that the transaction was originally intended as a security for money.

(*d.*) A conditional transfer of title is essential to constitute a mortgage.

Jones on Chat. Mortgages, Sec. 8.

X.

The precise contract under consideration in this case has been passed upon by the Supreme court of Iowa, and held to constitute an absolute transfer of title to David Dows & Co.

David Dows et al. v. *Morse et al.*, decided Dec. 7, 1883.

ARGUMENT.

One word as to the question of jurisdiction raised by the opposing counsel.

We sue in an action of trover, for the value of 10,000 bushels of corn, which we allege to have been worth $7,500.

The court below holds:

1st. That we did not own the corn—that we only held a mortgage upon it for $2,430.

2d. He found the value of the corn to be either $4,400 or $6,000.

The counsel for defendants in error subtract $2,430, the amount of the judgment below, from $6,000, and say the difference is only $3,570, which is not sufficient to give this court jurisdiction.

The arithmetic of the counsel is correct, but the conclusion to which they arrive cannot be sustained by any published decision of this court.

This case does not come within that of *Hilton* v. *Dickinson*, not yet reported.

Suppose this court examines this whole record. We allege (which certainly until the decision in the case last cited was conclusive of amount in controversy when plaintiff appealed), that the corn in controversy was worth $7,500. The court finds it was worth only $6,000, but under his view of the case, we could only recover $2,430, and it was entirely immaterial how much the

corn was worth, provided it exceeded that amount. Then, too, for all this court can tell, the corn may have been worth what we allege it to have been worth, and if so, the amount involved is over $5,000.

It cannot have been intended by this court to lay down a rule which would enable the judge of the court below, if he felt so inclined, to find a judgment for the plaintiff for an amount which would just prevent an appeal. We contend that a much safer rule is to hold that the amount claimed in the declaration shall govern, unless this court can determine from the record the precise amount in controversy. That cannot be done in this case, for if the decision below is reversed, we shall have the right to prove the value of the corn, and that with the amount we are entitled to, for interest, insurances and the one per cent., may amount to much more than $5,000.

On the Merits.

In the points filed, I have made free use of argument prepared by the Stuart Brothers, signed by me, and which to me seems conclusive of the case upon the merits, and to which I ask the careful attention of this court.

I will only add, that if this court entertains jurisdiction, the only question in the case is, whether or not the contract and crib receipt introduced in evidence constitute a mortgage or an absolute transfer of the title in the corn in controversy to David Dows & Co. They bear the same date, were executed and delivered at the same time, and constitute one transaction.

There was no parol evidence introduced tending to prove them to have been understood as a mortgage.

The court below found that they constituted a security for money, and that finding I respectfully submit was wrong.

The language of the contract is very plain. It states that David Dows & Co. are to furnish the Stetsons with money to buy ear-corn, at Greenwood, Nebraska. Stetsons agree to make such purchases for David Dows & Co., and to use the money furnished for no other purpose, and that the corn when purchased "*shall be the "property of David Dows & Co., and the cribs containing "the same shall be marked with the name of David Dows "& Co.*"

No language can be plainer than this. It is plain that it was intended between the parties that every bushel of corn bought by the Stetsons with the money furnished by David Dows & Co., should belong to that firm.

The contract further provided, that the Stetsons, "as a "compensation for their services in purchasing, handling, "cribbing, shelling and shipping the above corn, shall "receive whatever sum may remain when the corn is sold "by David Dows & Co., after David Dows & Co. shall "have received the moneys invested, and interest thereon "at the rate of eight per cent. per annum, also one (1) "cent per bushel, and such charges and expenses as may "have been incurred by them."

Does the last clause in any way modify or change the first, so far as the title to the corn is concerned? Plainly and certainly not.

If the corn was bought with the money of David Dows & Co., was stored in cribs marked David Dows & Co., that firm had the legal right to make any contract it saw fit with the Stetsons for their labor on the premises.

If David Dows saw fit to agree to pay the Stetsons for their services, all that the corn should bring in the market over and above a certain sum, they could do so without in any way or manner affecting their title to the corn.

It is claimed that the last clause of this contract in which the Stetsons guarantee David Dows & Co. against loss and also one cent per bushel and their expenses, is evidence that the whole arrangement was intended as a security for money.

This clause can receive no such construction.

The whole transaction was this, and nothing else.

The Stetsons had no money to buy the corn marketable at Greenwood, and were anxious to make some arrangement by which it could be bought. David Dows & Co., said to them, we will furnish you the money to buy this corn, but you must buy it and care for it as our agents—the corn must be bought with our money, and must be ours—it must be stored in cribs marked with our name; it must be shelled by you and shipped to us, in our name; it must remain ours until it is received and sold by us.

There must be no question about the title to, or the ownership of the corn to be bought under the contract. If you will attend to this business and will guarantee us against loss, which is equivalent to a guarantee that you will buy good corn and get it at a reasonable price, we will for your services pay you whatever the corn shall bring in the market, less the money advanced, one cent per bushel, and such costs and charges as we may have incurred.

The Stetsons accept.

The intention is plain, and as it seems to me beyond all doubt. David Dows and Co. would never have advanced

a dollar and taken a mortgage on this corn. They were willing to trust the Stetsons to act as their agents in buying, cribbing, and handling the corn, provided it should always be theirs, and under their control.

Not knowing the Stetsons, David Dows required of them some guarantee that the contract would be faithfully kept and performed by them.

They obtained from Johnson a guarantee of its fulfillment.

The contract was very plain and was in all respects fair, just and reasonable.

It was very liberal on the part of David Dows & Co., and very desirable and advantageous on the part of the Stetsons. It enabled them, as the agents of David Dows & Co., to purchase all the sound ear corn marketed at Greenwood, by the farmers, at the lowest price, and carry it until the next season, and for their services they were to have a large part of the almost absolutely certain appreciation in the value of the corn.

But it is said that this 10,000 bushels of corn was on hand at the date of the contract, which, it is claimed, makes some difference as to its construction.

That cannot be. This corn was taken and paid for under the contract. The crib in which it was stored, was set aside and marked "David Dows & Co."

All this Johnson well knew, and the fact of the guarantee can have no influence in determining the nature of this contract.

In the case of *David Dows et al.* v. *Morse et al.*, lately (December 7, 1883,) decided by the Supreme court of Iowa, contract and crib receipts precisely like those in

the case at bar were under consideration, and that court approve the following language of the court below:

"I think the simple question raised by the issues of the "right of possession is whether, in pursuance of this con- "tract, the corn was set apart as coming within the con- "tract by the parties, and placed subject to the conditions "of the contract. I do not think it makes a particle of "difference where the money came from. If, in pursu- "ance of the contract, the parties turned it over under "the contract and rendered it subject to it, and that was "the intention of the parties, then it would become sub- "ject to the contract."

In that same case the Supreme court of Iowa held that the following instructions given to the jury stated correctly the law:

"If the jury find from the evidence that the defendants "Morse & Lilly purchased corn in controversy, under "and in pursuance of the contracts which have been intro- "duced in evidence, and that they placed the corn in cribs, "and marked said cribs in the name of David Dows & "Co., and executed and delivered to said David Dows & "Co. the crib receipts, which have been admitted in evi- "dence, such acts would amount in law to a delivery of "the corn to David Dows & Co., and defendants Morse "& Lilly would have no right of possession in said corn, "except to handle the same, in shelling and shipping such "corn with the consent of David Dows & Co., and if "Morse & Lilly undertook to remove said corn from such "cribs, without the consent of David Dows & Co., or any "part of the same, or against their direction or protest, "such taking or disposition of the corn would constitute "a wrongful taking of the same."

"Under the contract in question the defendants, Morse "& Lilly, would be the agents of David Dows & Co. in "the purchasing, cribbing, shelling and shipping of the "corn purchased under the contract, and the authority "that is conferred upon Morse & Lilly is only the au- "thority to shell and ship the corn in the cribs as their "principal, David Dows & Co., shall direct, and assertion "of any right to said corn that would be counter to, or "would defeat the right of plaintiffs, David Dows & Co., "would be a wrongful taking of the same."

This case covers the legal questions arising in the case at bar, and in my judgment is conclusive.

On behalf of the plaintiffs in error I ask the careful attention of this court to the contract in question.

They have under similar contracts advanced millions of money to merchants throughout the North-west. Such advances have been a great advantage to the farmers who are unable to carry their crops for a year, to the merchants who are in present need of the money to be received by the farmers for their products, and to the agents employed by David Dows & Co. to transact their business.

Every judge who has up to the present time been called upon to construe these contracts, except the distinguished jurist who tried this case below, has held that these contracts and crib receipts vested the title to the grain purchased thereunder absolutely in David Dows & Co. It is of great importance, not only to the plaintiffs in error, but to thousands of others, that the questions arising in this case be finally settled by this high tribunal.

HENRY S. MONROE,
For Plaintiffs in Error.

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OFFICE SUPREME COURT U.S.
FILED
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JAMES H. McKENNEY, Clerk.

ARGUMENT.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 1182.

DAVID DOWS & CO., PLAINTIFFS IN ERROR,

vs.

P. P. JOHNSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IOWA.

Argument of Stuart Bros. and H. S. Monroe, Attorneys for Plaintiff.

IN THE SUPREME COURT OF THE UNITED STATES.

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vs.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IOWA.

Argument of Stuart Bros. and H. S. Monroe, Attorneys for Plaintiff.

I.

We will first call your attention to defendant's argument in support of his motion to dismiss this case for want of jurisdiction. It is claimed that this record shows that there is not now five thousand dollars ($5,000 00) in dispute, between the parties, and hence this court cannot take jurisdiction of the case on appeal, or writ of error. We have carefully read the opinion of this court, in the late case of Hilton vs. Dickinson, and we claim that under the rule there laid down, the plaintiff's motion must be over-ruled.

We quote the following portion of said opinion:

"Under this rule we have jurisdiction of a writ of error, or an appeal by the plaintiff below, when he sues for as much as, or more than our jurisdiction requires, and recovers nothing, or recovers only a sum, which, being deducted from the amount or value sued for, leaves a sum equal to or more than our jurisdictional limit, for which he failed to get a judgment or decree."

Now, by reference to the plaintiff's petition in this case, you

will see that they claim of and from the defendant the sum of $7,500.00. This is the amount stated in the body of the declaration, and not merely as damages alleged, or as a prayer for judgment.

The amount recovered in the court below was $2,430.00, and this being subtracted from the $7,500.00, still leaves $5,070.00 in dispute, and in such cases, we understand from the opinion referred to, this court has jurisdiction.

In order to sustain the plaintiff's motion, the court will have to go a step farther than it has ever yet gone and hold that jurisdiction is to be determined from the findings of the court below, on incidental questions arising in the trial.

It is claimed that, because in one finding, the value of the corn is ascertained to be less than $7,500.00, therefore no appeal lies; but we claim that this is simply one of the errors committed by the court below in the trial of this case.

It is claimed, however, that we are not now prepared to show that there was error in this finding.

Suppose that we are not. Does it follow that the case cannot be reversed for other errors? If we are prepared to show that the court erred in its conclusions, as to the law applicable to the case; if the construction which it placed upon the contract is unwarranted by the law, are we not entitled to a reversal of the case without showing further errors? We understand that the amount in dispute between the parties, as intended by the statute, is to be ascertained by deducting from the amount claimed in the declaration the amount recovered by the plaintiff in the court below. Counsel are mistaken in assuming that plaintiffs did not except to the findings of fact in the court below, as you will see by reference to the record. Counsel are also mistaken in stating that plaintiffs did not ask for a new trial. We promptly filed a motion for a new trial, which was over-ruled, and such ruling was duly excepted to, as is shown by the record.

II.

In reply to defendant's argument on the merits of this case, we will, in the first place, insist that they misconstrue the contract and the findings of the court; they also go outside of said findings, and attempt to state facts to justify the judgment of the court below.

We have sufficiently expressed our views on these questions,

in our former brief filed in this case, and now simply desire to answer certain statements made on the 6th page of the defendant's brief.

We have insisted, and still insist, that the court below distinctly held that the contract in question, on its face, constituted in law a mortgage or a mere security for money advanced thereon.

In reply to this position, counsels say:

"There being no bill of exceptions, preserving the evidence it is impossible for this court to know on what evidence the district court based its findings, and it may not be out of place here to state that on the trial, evidence was introduced, tending to show that plaintiffs charged the $2,000 to Stetsons on their books of account."

Now, in view of the express findings of fact, and the conclusions of law, as shown by the record, it seems to us that this argument is begging the question, and clearly out of place.

It is true, there is no bill of exceptions, showing what evidence was introduced, but it is equally true that there is no finding of facts, based on any evidence in relation to the intention of the parties in making said contract, but it is distinctly stated that:

"The court finds, *as a matter of law*, that the contract and crib receipt constitute a security for the money advanced by the plaintiffs."

It nowhere appears from said findings that such conclusion of law is based upon any evidence outside of the written contract and crib receipt, as to the understanding or intention of the parties in making the contract, and we here distinctly deny that there was any evidence af any kind or character introduced in the trial of this case—(outside of said written instruments)—tending to show the intention of the parties thereto. It was claimed by the defendant that said instruments, on their face, simply constituted a mortgage or lien on said corn, and this is just what the District court decided, as will appear from an examination of their findings.

Counsel not only go out of the record, and undertake to state what evidence was introduced in the court below, but also state that they had other evidence which was not introduced on the trial, and they claim that it would be unfair for this court to render a final judgment in the case without giving them an opportunity to prove that the transaction was understood and treated by the parties as a mere security.

This is certainly a novel position If, und r the record, this

court can make an order granting a new trial, we certainly have no objections to giving the defendant an opportunity to introduce all the evidence he desires on this question; but we insist that this case was determined in the court below alone upon the written contracts shown in the record, and that this is shown in the record, and that the legal construction of these contracts by the District court, was clearly erroneous; and the question we present to this court, and which we ask to be decided, is this:

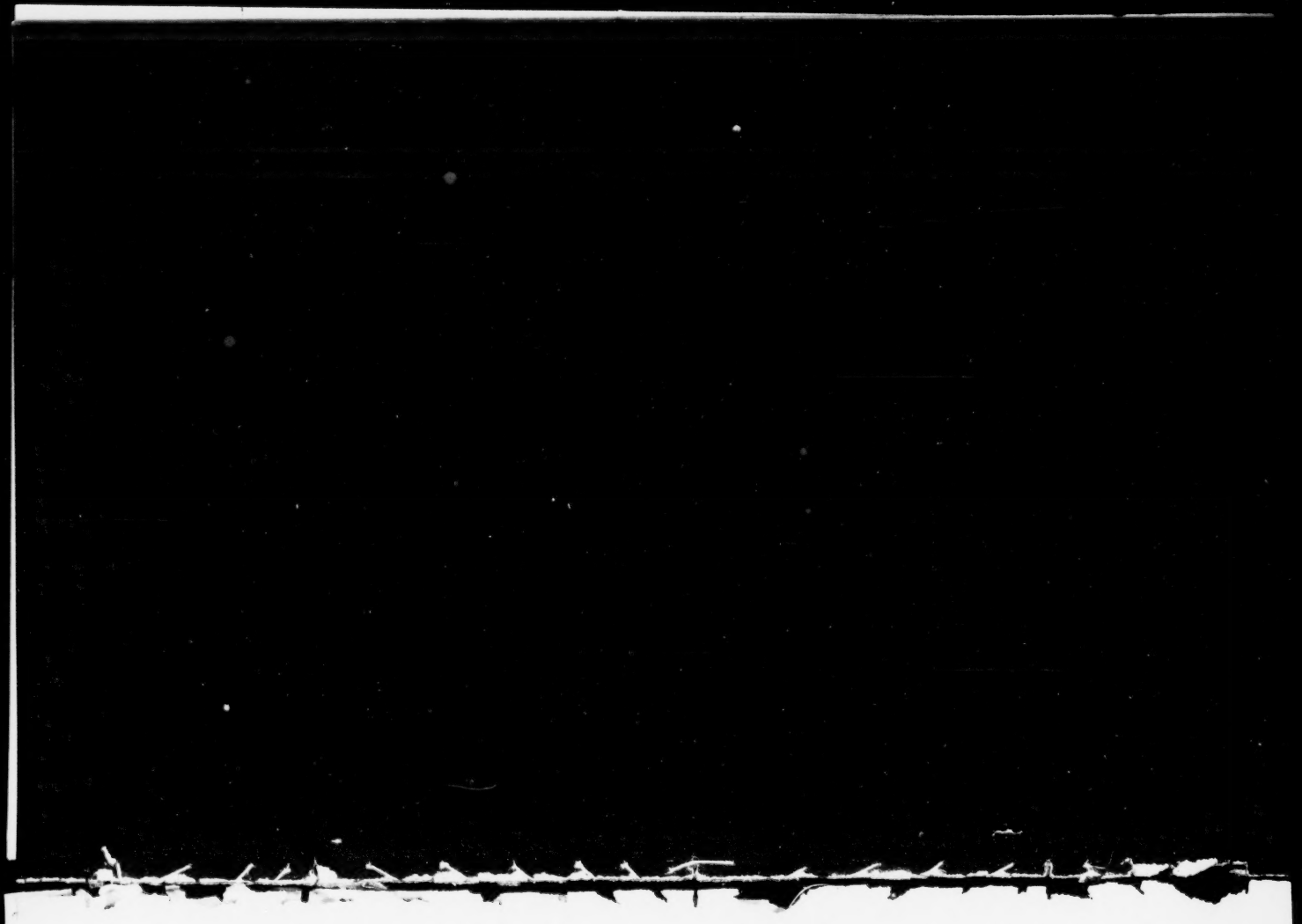
In a matter of fact, does the contract and crib receipt simply constitute a security, for the money advanced thereon by plaintiffs? or do they show that the plaintiffs are the absolute owners of the corn purchased and cribbed in pursuance thereof?

If the determination of this question by this court, necessarily results in a judgment against the defendant in the condition of this record, then we ask that such judgment be entered.

Respectfully Submitted.

STUART BROS. AND H. S. MONROE.

Attorneys for the Plaintiffs in error.



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IN THE

Supreme Court

Of The

UNITED STATES.

David Dows & Co., vs P. P. Johnson,

Defendant's Argument on Motion to Dismiss Appeal, and on the Merits.

The defendant respectfully challenges the jurisdiction of the court to review this case. on the ground that the amount in dispute is less than five thousand dollars, as clearly appears from the record. Plaintiffs sue in trover for the conversion of ten thousand bushels of corn, and in their petition allege that it is worth about seven thousand five hundred dollars, and claim judgment for that amount. The defendant in his answer denies that plaintiffs were the absolute owners of the corn, but alleges that they only had a lien thereon, in the na-

ture of a chattel mortgage, for two thousand four hundred and thirty dollars, which amount he offered to pay them at the time of the conversion. That the Stetson's, the owners of the corn were indebted to him for large sums of money, to secure which he took a chattel mortgage on the corn in controversy; that he took the corn for the purpose of paying said indebtedness, and immediately offered to pay plaintiffs the amount of their lien, which was two thousand four hundred and thirty dollars, which they refused to accept, and that he has at all times since been ready, willing and able to pay and offered to confess judgment for said amount.

The court in the 9th finding of facts, finds "That during the forepart of December 1881, the defendant, for the purpose of securing himself under the chattel mortgage aforesaid, and with the intention, willingness and ability to pay the lien of plaintiffs, and recognizing the same, took possession of said corn with the consent of said Stetsons, and sold the same."

10. "That defendant has ever been ready to pay the amount due plaintiffs by reason of the said contract, guaranty and crib receipt; that is the sum of twenty-four hundred and thirty dollars, being the sum of $2000. advanced, 8 per cent. interest and one cent per bushel commission."

12. "That there was ten thousand bushels of corn in said cribs, worth forty-four (44) cents per bushel at the time the same was disposed of by defendant, and that just before the commencement of this suit was worth sixty (60) cents per bushel."

13. "That the said sum of money advanced by plaintiffs with interest thereon and commission as provided in said con-

tract, and expenses incident thereto, now amounts to two thousand four hundred and thirty dollars. ($2430.)"

No exceptions were taken to these findings by the plaintiffs but were and still are acquiesed in by them as the facts in the case; conceding so far as this motion is concerned, that the measure of damages, if plaintiffs were the absolute owners of the corn, would be the highest market price of the corn at any time before suit brought, which was sixty cents per bushel or six thousand dollars for the whole lot, the amount in dispute is less than $5000. Defendant offered them more than two thousand dollars leaving a balance in dispute of less than five thousand dollars If this is the correct method of ascertaining the amount in dispute, it is clear that this court has no jurisdiction. If the amount claimed in the petition is the criterion, then the amount is sufficient to give jurisdiction. We think in this case the amount claimed in the petition should not be taken as the criterion, the plaintiffs are in this court asking a judgment on the findings of fact by the circuit court, by which they would be entitled to but six thousand dollars, but there is $2430 of this amount admitted, for which they already have judgment, so that the only dispute is over the difference between these two amounts. The court will bear in mind that the plaintiffs are not asking for a new trial, they have no bill of exceptions, they are entirely satisfied with the finding of facts; and even if they were not, they are not now in a condition to complain, that has been finally adjudicated. They have not appealed from those findings, and they are conclusive upon them. See

Stratton vs Jarvis et al. 8 Pet. 10.

McGinnis vs Carlton, Abb. Adm. 570.
Young vs McWaid, 57 Iowa 101.

This case holds that the amount in controversy at the time the appeal is taken must govern the right to appeal.

It is well settled that where judgment is rendered against the defendant, and he seeks a review in this court, that the judgment is conclusive as to the amount in dispute, regardless of the amount claimed by the plaintiff, on the theory that the plaintiff is satisfied with the judgment, see

Lamar vs Micou, 104 U. S. (1 Miller) 74, and cases cited.

We think the same principle applies to this case. The plaintiffs are satisfied with the value fixed upon the corn by the circuit court, and are asking a judgment based on said valuation but $2430 of this amount is not in dispute, and never was, leaving a balance of less than four thousand dollars in dispute.

We have just seen the syllabus of the case of Hilton vs Dickenson, decided by this court, but not yet reported, which seems to be in point. Defendant therefore asks that the writ of error in this case be dismissed. But if the court should be of opinion that the amount in dispute is sufficient to give jurisdiction, we submit the following

ON THE MERITS OF THE CASE.

An examination of the finding of facts by the circuit judge will show that plaintiffs furnished to Stetsons two thousand dollars with which to buy corn in Nebraska. That said money was to be used in buying corn and for no other purpose. That the corn so bought was to be shipped to plaintiffs, who were commission men in Chicago, and by them sold. They were to deduct from the proceeds of the sale, the money so advanced by them with *eight per cent interest* from the time it was so furnished, together with one cent per bushel as *commission* for their services in selling said corn, and all freight charges and expenses, and pay the balance to said Stetsons. And Stetsons guarantee that no loss should occur to plaintiffs by reason of the transaction. The performance of these conditions by Stetsons was secured by the written guaranty of this defendant, and by the crib receipt on ten thousand bushels of corn, *then in crib*, belonging to Stetsons and fully paid for. No part of the money furnished by plaintiffs being used in paying for it. The crib receipt being a printed form used where corn was actually bought with plaintiffs money. Stetsons failed to perform their part of the contract, but used the $2000 for some other purpose. The defendant was liable to plaintiffs on his guaranty, besides which the Stetsons were largely indebted to him. To secure himself on these liabilities he took a chattel mortgage on the corn, and with the consent of Stetsons, sold it. He at once notified plaintiffs and offered to pay them the $2000 with interest and commission as provided in said contract, which they refused to accept, claiming that they were the full and absolute owners of the corn, and that is what they now claim, and they insist that the facts as found by the cir-

cuit court, establish their ownership, and they ask judgment on said facts for the value of the corn. The circuit court was of opinion from the facts that plaintiffs only had a lien on the corn for the amount of their advances with interest and commissions, and so held. Plaintiffs say that there is no pretense that the parties understood that plaintiffs were only to have a lien on the corn; and that the rights of the parties must be determined alone from the contract and crib receipt. There being no bill of exceptions preserving the evidence, it is impossible for this court to know on what evidence the circuit court based its findings. The amended answer of defendant on which the case was tried, expressly states that it was intended by the parties at the time as a lien or mortgage, and so received by plaintiffs, and it may not be out of place to here state that on the trial evidence was introduced tending to show that plaintiffs charged the $2000 to Stetsons on their books of account, and in their statements sent them from time to time of the condition of their account, included this $2000 as an item of charge; and further that defendant had an abundance of evidence on this point which was not introduced because the construction put upon the writings by the court made it unnecessary. It would now be unfair, it seems to us, even if this court should be of opinion that the writings, *by themselves* constitute an absolute sale of the corn, to now render judgment for its value, it would deprive the defendant of the opportunity of proving that the transaction was understood and treated by both parties as a mere security. But it seems clear to us that the holding of the circuit court is clearly right. If the plaintiffs purchased the corn and the $2000 went to pay for it, why

require Stetsons to pay them 8 per cent. interest on the purchase price; why require Stetson's to pay to David Dows & Co. interest on their own money? If the corn became the absolute property of David Dows & Co., then as a necessary consequence the $2000 became the absolute property of Stetsons, and they could do as they pleased with it; but this contract requires that they shall use it for the purpose of buying corn. Again if the corn was the absolute property of David Dows & Co., why should they charge Stetsons a commission of one cent per bushel for selling their own corn, and then give Stetsons all the profits. Again if the ten thousand bushels of corn was the absolute property of plaintiffs, suppose that Stetsons had used the $2000 according to the contract, and had bought other ten thousand bushels of corn with it and put it in cribs at Greenwood and marked them with the names of David Dows & Co., whose corn would that be, and whose would the first ten thousand bushels be? Again suppose the corn in controversy had been destroyed by fire or flood, and Stetson's had failed to comply with the contract, and plaintiffs were seeking to recover their damages from this defendant on his guaranty, what would be the measure of damages? surely not the value of the ten thousand bushels of corn; would it not be the $2000 with 8 per cent. interest, and possibly a commission of one cent per bushel on the amount of corn that could have been bought and cribbed in Greenwood during that season with $2000.

The facts as found by the court show clearly that the agreement and crib receipt were delivered to plaintiffs at the *same time* and before they advanced the $2000 and that the ten thousand bushels of corn was then in crib, the property of

Stetsons, all paid for, and that not a dollar of plaintiff's money was used in paying for it. Now if it was understood and intended by the parties that this transaction was only a purchase of the corn then in crib, why the written contract and guaranty? If they bought the corn and paid for it why require Stetsons to pay interest on the consideration money, and why require defendant to guaranty the performance of the agreement of Stetsons. The plain simple facts are that plaintiffs being commission men, were anxious to extend their business, and with that object in view, furnished money to Stetsons with which to buy corn, which was to be shipped to plaintiffs, in Chicago, and by them sold, for which they were to receive one cent per bushel commission, double the usual price charged by commission men, and eight per cent on the money invested; which is conceded by plaintiffs to be the highest rate of interest which money would bring at that time. The money so furnished by them was to be used for no other purpose, and to guard against loss, in case Stetsons should use it for some other purpose, they required the guaranty of this defendant, and not being satisfied with that, and refusing to advance the money without further security, the crib receipt was executed and delivered for the sole and only purpose of securing plaintiffs against loss in case Stetsons should fail to comply with the terms of the contract, and with no thought, by either party, that they were buying the corn. Stetsons did fail to comply with their agreement, and plaintiffs had their remedy against the corn and against Johnson on his guaranty, and their measure of damages would be the $2000 advanced, with interest and commission of one cent per bushel and *no more*.

It is contended by counsel for plaintiffs that no way was provided by which Stetsons could have *redeemed* this corn, therefore it was the absolute property of plaintiffs. If Stetsons had complied with their agreement by buying corn with the $2000 and shipping it to plaintiffs, then their claim on the ten thousand bushels would have been extinguished, the corn would have been redeemed. Again counsel claim that it can make no difference to Stetsons whether the transaction be construed as an absolute sale of the corn or as a mortgage, that their rights would be the same in either case. This argument applies with greater force to plaintiffs, for if the corn had been shipped to plaintiffs they would only be entitled to retain the money advanced with interest, commissions and expenses, in either case. But plaintiffs claim in their argument that Stetsons owed them other sums of money, which they had a right to retain out of the proceeds of the corn, but no issue of the kind was made by the pleadings and there is no such finding by the court. The defendant took the corn, not for the purpose of injuring plaintiffs, but to secure himself against the liabilities of Stetsons to him. He knew and recognized plaintiffs lien on the corn, and promptly offered to pay them all that they could possibly have realized out of the corn if it had been shipped to them by Stetsons. What more could they ask? Conceding that defendant had no *legal* right to take and dispose of the corn, as against the plaintiffs, yet having done so, when he pays them all that they could possibly get out of the corn, they ought to be satisfied.

Plaintiffs complain that defendant has no right to buy out the Stetsons interest in the corn, and compel them to settle

with him instead of Stetsons. We see nothing wrong in this, there was nothing to prevent Stetsons from selling their interest in the corn, and the purchaser would stand in their shoes, and if he respected the rights of plaintiffs, or if he disregarded their rights, but paid them the full measure of their damages, they would have no right to complain.

If Johnson had shipped the corn to plaintiffs, they would have been compelled to account to him, in the same manner that they did to the Stetsons if they had shipped it. It seems to us that there is no possibe way in which this case can be viewed without arriving at the same conclusion the circuit court arrived at. We have not thought it necessary to review the numerous authorities cited by the learned counsel for plaintiff, for the reason that they are not in point. We think the questions presented are simple and easily understood. Neither have we thought it necessary for the same reason, to fortify our view of the case, with any extensive citation of authorities, but we refer the court to the case of

Thorn vs Bank, 37 Ohio, State, 254.

which we think is strongly in point.

Plaintiffs contend that they are entitled to recover the highest price of corn at any time before suit brought. The general rule in actions of this kind is that the measure of damages is the value of the property at the time of the conversion with interest. If there are any special reasons for adopting the rule contended for by plaintiffs, it should be specially plead

and proved, but in this case, there was nothing in the petition to take the case out of the general rule. We think the weight of authority is in favor of the rule as we have stated it, especially when, as in this case, the person converting the property only received the market price at the time of the conversion. And in this case there is nothing to show that plaintiffs would have kept the corn till the following July, when the high price was first reached.

And further it is very apparent that the defendant acted in good faith without any design or intention to injure plaintiffs in the least.

The authorities on both sides of this question are collected by Field in his work on Damages in Chapter 33, to which we invite the attention of the court, if it should become necessary to investigate this branch of the case. We think the judgment of the circuit court should be affirmed.

Respectfully submitted,

~~SMITH & BEESON,~~

~~Att'ys for Def't.~~

Sam. M. Chapman
& W. F. Sapps.
Attys. for Def't.